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Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

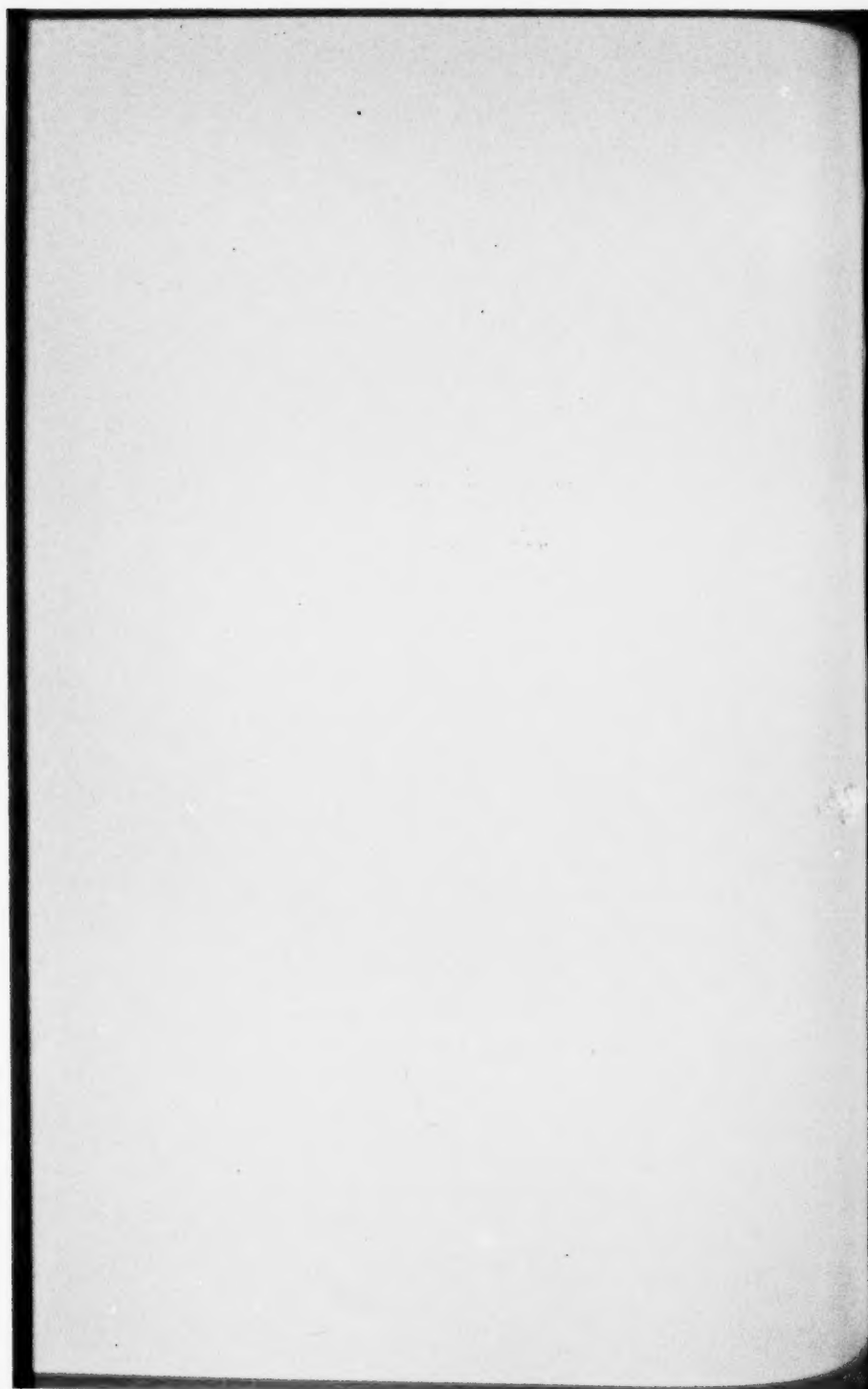
WERT T. REED AND F. F. DOLLERT
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIFTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF

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**PETITION FOR WRIT OF CERTIORARI TO THE
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IN SUPPORT THEREOF**

*To the Honorable Chief Justice of the United States
and the Associated Justices of the Supreme
Court of the United States:*

Wert T. Reed and F. F. Dollert pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on the 8th day of January, 1943, (Tr. R. 1041), affirming the judg-

ment of the District Court for the Southern District of Texas, Houston Division, (Tr. R. 504), and in this connection respectfully show:

The decision of the Circuit Court is as follows: (Omitting Preliminaries).

"It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the district court are free from error, and the judgment appealed from is affirmed." (Tr. R. 1042). *Reed v. Houston Oil Co. of Texas, et al.*, 132 F. (2) 748.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

This is a stockholders' action, brought by petitioners Wert T. Reed and F. F. Dollert, stockholders of the defendant, Pratt-Hewit Corporation (Delaware) referred to as "Pratt-Hewit Corporation," for themselves and all other stockholders similarly situated.

The purposes of this suit are—

FIRST—to cancel the written oil and gas contract entered into on September 28, 1925, between the Houston Oil Co. of Texas referred to herein

as the "Houston Oil Co.," and the Pratt-Hewit Corporation, on the grounds that

(a) Thomas H. Pratt, the Pratt-Hewit Corporation's dominant and controlling stockholder, secretary and treasurer, director and resident manager before and after said contract was made and who negotiated this contract on behalf of the Pratt-Hewit Corporation, was secretly having financial dealings personally with the Houston Oil Co. and therefore had disqualified himself from representing his corporation because of conflict of self interest with duty.

(b) By the September 28, 1925 contract, the directors of the Pratt-Hewit Corporation unlawfully attempted to delegate all the powers and discretion vested in them by the charter of the corporation and the laws of Texas and Delaware, to strangers, the officials and directors of the Houston Oil Co., a competitor.

(c) The contract violates the Usury Statute of Texas.

(d) The contract violates the Anti-trust laws of Texas.

SECOND—to impress all the property, real and personal, taken possession of by the Houston Oil Co. by virtue of said contract from September 28, 1925 to date, with a constructive trust with the Houston Oil Co. as trustee and Pratt-Hewit

Corporation as cestui que trust as of September 28, 1925.

THIRD—to cancel the stock of the Pratt-Hewit Corporation issued to Thos. H. Pratt for services alleged to have been rendered by him.

Relevant Facts as to Foregoing Points (a) (b) (c) (d)

(a) As to Pratt being Disqualified from Representing the Pratt-Hewit Corporation in making the September 28, 1925, Contract.

Pratt had disqualified himself from negotiating the September 28, 1925 contract in behalf of the Pratt-Hewit Corporation in that for several months before the contract was made he was having secret financial dealings with the Houston Oil Co. in which that company was abetting with its money Pratt's betrayal of his corporation.

By these dealings Pratt placed himself in a position where his personal interest conflicted directly with the duty he owed his corporation and its stockholders. His right to represent the Pratt-Hewit Corporation had come to an end the moment he tried to do the impossible of attempting to serve conflicting dual interests. Whether the deal was fair or unfair, or a fraud had or had not been perpetrated upon his corporation, is immaterial. In fact, as petitioners maintain and is shown by the written instruments exe-

cuted and made by the Houston Oil Co. and Pratt, and kept secret in the files of Pratt and the Houston Oil Co., it is apparent that a fraud was perpetrated upon Pratt's corporation and its stockholders. The acts committed are of such a character that they are per se fraudulent.

In December, 1939, about two months before the case went to trial, petitioners, through Court Order, were permitted to examine the books of the Houston Oil Co. Upon that examination it was learned for the first time that the Houston Oil Co. had accommodated Pratt with loans of money before and after the September 28, 1925 contract was made. The following are the dates and amounts of these loans:

June 6, 1925—\$5,000; August 31, 1925—\$5,000; October 1, 1925, two days after the September 28, 1925 contract was made, the two notes were consolidated into a \$10,000 personal note of Pratt and payment extended; December 6, 1927—\$2,000, and a fourth loan of \$2,500 on December 23, 1931. This is according to the testimony of H. W. Fairbrother, supervisor of accounting of the Houston Oil Co. and the books of account of the Houston Oil Co. showing *personal loans* made to Thos. H. Pratt. (Tr. R. 768-780).

The foregoing list recites only a part of the bribes given. The Houston Oil Co. and its then president, E. H. Buckner, on January 1, 1926 paid to Thomas

H. Pratt in cash \$51,071.40. This was accomplished by the artifice so frequently resorted to in the attempt to make the deal appear innocent and that is, to have a third party convey to the one to be bribed a piece of valuable property for an inadequate consideration, or none at all, and then have the briber come in and pay the bribe taker a lucrative price. That scheme was worked out in the following manner: F. B. Rooke and wife, who owned a 200 acre tract of land adjoining a lease belonging to the Pratt-Hewit Corporation on which the latter corporation had drilled two natural gas producers, each capable of producing more than 80,000,000 cubic feet of gas per day, (Tr. R. 836) gave to their son, A. D. Rooke, an oil and gas lease on said 200 acre tract on June 8, 1925.

Two days thereafter, to-wit: June 10, 1925, the Houston Oil Company and Rooke entered into a written drilling contract whereby the Houston Oil Co. agreed to drill an exploratory well on said 200 acre lease at its own expense on the condition that if the well should be a commercial producer of either oil or gas, then the Houston Oil Co. was to be permitted to operate the well until its production repaid the Houston Oil Co. for drilling and equipping the well, after which it was to move its drilling equipment from the lease and turn the lease over to Rooke. If the well should prove to be dry, then the Houston Oil Co. must take the entire loss. Remember, the Houston Oil Co. had no interest in the lease. The contract provided that if the well should be a producer, then the Houston Oil Co. reserved the right to

purchase the oil or gas at the current market price. (Exhibit 10, Tr. R. 916-924).

On August 29, 1925, a second contract like the other one, except that it provided for drilling two wells instead of one, was entered into between the Houston Oil Co. and Rooke. (Exhibit 10A, Tr. 924.

On November 13, 1925, A. D. Rooke assigned to Pratt an undivided $\frac{1}{2}$ interest in said 200 acre lease and in addition to the contract provided that Pratt was to be subrogated, to the extent of his $\frac{1}{2}$ interest in said 200 acre lease, to the rights of A. D. Rooke in the two free drilling contracts which A. D. Rooke had with the Houston Oil Co. (Exhibit 11, Tr. R. 933-936).

Rooke testified: "Mr. Pratt didn't pay him any money consideration for the property." (Tr. R. 836).

However, it will be shown that Rooke had written up a conveyance to Pratt, the same as this one, sometime between the dates of the said two drilling contracts, but that when it was decided that a second drilling contract was to be made, the conveyance was torn up because the conveyance which he was to give Pratt should include the $\frac{1}{2}$ interest right in the second drilling contract as well as in the first. (Tr. R. 836).

Without anything transpiring to increase the value of the lease, on January 1, 1926, the Houston

Oil Co. paid Pratt \$32,500 in cash for an undivided 7/32 interest in said 200 acre lease. (Exhibit 12, Tr. R. 937-940). On the same day E. H. Buckner, the then president of the Houston Oil Co., paid Pratt \$18,571.40 for a 4/32 interest in the 200 acre lease. (Exhibit 13, Tr. R. 940-944). For these interests Pratt paid nothing, as Rooke himself testified, *supra*.

On June 8, 1933, the two drilling contracts made between the Houston Oil Co. and A. D. Rooke, in which Pratt was given a half interest, were, in writing, modified, enlarged, and continued in force and effect by the Houston Oil Co., Rooke, and Pratt. (Exhibit 37, Tr. R. 973-977).

None of the foregoing instruments, with the exception of the lease given by F. B. Rooke and wife to their son, A. D. Rooke, were ever placed of record. No explanation ever was offered as to why they were not recorded. Oil companies and men engaged in the oil business never fail to record oil leases and assignments of them. It is the only way in which they can protect themselves from innocent purchasers

Including the foregoing, there were at least 18 Overt Acts committed between the Houston Oil Co. and Pratt in their conspiracy to defraud Pratt's corporation, the Pratt-Hewit Corporation. These are discussed at greater length on pages of appellants' motion for rehearing, pages 11 to 22 and in the Tr. R. 1054-1065. Unfortunately, in the mo-

tion for rehearing, page references are given to appellants' main brief and not to the Transcript of Record. Consequently, a list of these 18 Overt Acts of conspiracy is given with Transcript of Record paging.

OVERT ACTS

One—First conference between the Houston Oil Co., Pratt and Rooke. (Tr. 835-836 and 840-841).

Two—June 6, 1925 Houston Oil Co. loaned Pratt \$5,000. (Tr. R. 769-780)

Three—June 8, 1925 oil and gas lease from F. B. Rooke and wife to A. D. Rooke. (Exhibit 9, Tr. R. 911-916).

Four—June 10, 1925, drilling contract between the Houston Oil Co. and Rooke executed. (Exhibit 10, Tr. R. 916-924).

Five—Between making of the first and second drilling contracts Rooke prepared an assignment by which he gave Pratt an undivided $\frac{1}{2}$ interest in the lease and drilling contracts. (Exhibit 11, Tr. R. 835, 841). This was torn up.

Six—August 26, 1925. Drilling contract between the Houston Oil Co. and Rooke was executed. (Exhibit 10A, Tr. R. 924-932).

Seven—August 27, 1925. Pratt had directors of his corporation authorize him and Direc-

tor Sharp to institute a suit against Hewit and Pratt, himself, and one Seagraves, to cancel gas contract of April 16, 1923, given by Pratt-Hewit Corporation to Pratt and Hewit and assigned by them to Seagraves in 1924. This contract stood in the way of making the September 28, 1925 contract. (Tr. R. 716-717).

Eight—Second loan of \$5,000 on August 31, 1925 by the Houston Oil Co to Pratt. (Tr. R. 769).

Nine—First producing well on the Rooke lease was a commercial producer and came in early in September, 1925. The leasehold income for that month was \$7,268. One-half of this, according to Rooke's testimony, already belonged to Pratt by oral agreement. See Tr. of R. 836 and 837, Rooke's Testimony, Sharpe's letter of October 28, 1925, Exhibit 33, Tr. R. 968-972, and Fairbrother's testimony, Tr. R. 778-779).

Ten—September 28, 1925 contract executed. (Exhibit 4, Tr. R. 876).

Eleven—September 28, 1925, Pratt filed suit in Federal Court against himself, Hewit and Seagraves to cancel gas contract. (Tr. R. 720).

Twelve—October 1, 1925. Consolidation of two \$5,000 loans into a \$10,000 loan to Pratt by Houston Oil Co. (Tr. R. 769) and the time of payment extended.

Fairbrother, Houston Oil Co.'s supervising accountant, testified:

"Q. This was a loan *personally* to Thomas H. Pratt?

"A. That is right." (Tr. R. 769-770).

Thirteen—November 13, 1925. Rooke assigned an undivided $\frac{1}{2}$ interest in his 200 acre lease to Pratt and Pratt was subrogated to Rooke's rights in the two drilling contracts and for which Pratt paid nothing. (Exhibit 11, Tr. R. 933-936). Rooke testified: "Mr. Pratt didn't pay him any money consideration for the property." (Tr. R. 836).

Fourteen—January 1, 1926. The Houston Oil Co. paid Pratt \$32,500 for an undivided $\frac{7}{32}$ interest in the 200 acre lease. (Exhibit 12, Tr. R. 937-940).

Fifteen—January 1, 1926. E. H. Buckner, president of the Houston Oil Co. paid Pratt \$18,571.40 for an undivided $\frac{4}{32}$ interest in the 20 acre oil and gas lease. (Exhibit 13, Tr. R. 940-944).

Sixteen—December 6, 1927. Third loan of \$2,000 made to Pratt by the Houston Oil Co. (Tr. R. 770-771).

Seventeen—December 23, 1931. Fourth loan of \$2,500 made to Pratt by the Houston Oil Co. (Tr. R. 770-771).

Eighteen (a) Drilling Contracts Exhibits 10 and 10A Modified, Enlarged, Ratified and Continued "In full force and effect" by the Houston Oil Co., Pratt and Rooke. (Exhibit 37, Tr. R. 973-977).

The foregoing instruments, with the exception of the lease of F. B. Rooke and wife to A. D. Rooke, were never put of record. It was, therefore, impossible for anyone to have discovered them for they were carefully kept secret in the private files of the Houston Oil Co. In December, 1938 Pratt's wife, Grace D. Pratt, his two daughters, Laura J. Shaw and Frances R. Webster, and Pratt's son, George P. Pratt, placed of record two instruments (Exhibit 39, Tr. R. 984-987 and Exhibit 38, Tr. R. 978-981) which recite Pratt's $\frac{3}{32}$ interest in the Rooke 200 acre lease. These instruments were accidentally discovered of record in March or April, 1939 while search for some other records was being made by counsel for plaintiff Reed.

There was also found of record an assignment executed by E. H. Buckner in which the latter conveyed to the Houston Oil Co. his $\frac{4}{32}$ interest in the Rooke 200 acre lease dated August 1, 1932, which he had received from Pratt in January, 1926 as has been described herein. This was put of record in January, 1935. (Tr. R. 951). This instrument gave additional information. In September or October, 1939, E. H. Buckner was shown certified copies of the last three instruments. He then stated that he had paid Pratt \$18,000 for his undivided $\frac{4}{32}$ interest

in the Rooke lease and that the Houston Oil Co. had paid Pratt \$50,000 for its undivided $7/32$ interest in the lease. With this additional information coming from the president of the Houston Oil Co., who personally had negotiated the deal for his company with Pratt, it was felt that we then had sufficient information to commence the action. Suit was filed the 12th day of February, 1940. After suit was filed, upon Order of the Court, the Houston Oil Co. produced the bribing instruments just described and which were Exhibits 10, 10A, 11, 12 and 13, respectively.

Rooke conveyed to Pratt $1/2$ of the leasehold interest in his 200 acre lease which represents a $7/8$ or $28/32$ interest of all the oil and gas in place under the lease, the remaining $4/32$ being the $1/8$ landowner's royalty. Pratt, therefore, originally owned a $14/32$ of all the oil and gas in place underneath the 200 acres. He conveyed to the Houston Oil Co. $7/32$ and to Buckner $4/32$. This left Pratt an undivided $3/32$ interest. This interest Pratt still owned at the time of his death. Rooke's assignment to Pratt of an undivided $1/2$ interest in the 200 acre lease (Exhibit 11, Tr. R. 933-936) was never put of record and has never been discovered by the heirs as Grace D. Pratt's attorney stated in open court:

"Morrow . . . the assignment from Rooke to Mr. Pratt, was lost. We don't know where it is or why it was never placed of record. We have never seen it." (Tr. R. 792).

Consequently, it was necessary that Pratt's wife

file an affidavit that Pratt had received such interest in the Rooke lease and still owned it at the time of his death, September 3, 1938. *Explanatory Note:* (In Mrs. Pratt's affidavit and her assignment to Pratt's son and two daughters the interest is described as a $\frac{3}{28}$ in the leasehold interest which in amount is exactly the same as a $\frac{3}{32}$ interest in all the oil and gas underneath the lease, which represents both the leasehold and the landowner's interest).

Pratt's wife divided this with the two daughters and son of Pratt so that each of the four now own a $\frac{1}{4}$ of the $\frac{3}{32}$. This interest is still producing considerable oil and gas and has produced continually ever since the first of September, 1925. Consequently, Pratt received his monthly check every month from September, 1925 until his death. During all that time he was the one resident official who represented the Pratt-Hewit Corporation in all its dealings with the Houston Oil Co.—the only company with which the Pratt-Hewit Corporation had any business.

After Pratt's death on September 3, 1938, the income from the $\frac{3}{32}$ which Pratt had owned in the Rooke 200 acre lease was and is still being paid to his heirs, the son, George P. Pratt, and the daughters, Frances R. Webster and Laura J. Shaw.

Fairbrothers, the Houston Oil Co's supervising accountant, testified as follows:

"By. Mr. Bartelt.

"Q. To whom does Thomas H. Pratt's royalty go now?

"A. That goes to—I am not sure of the names of all of them—Grace D. Pratt and George P. Pratt and Mrs. Frances R. Webster and one or two other interests, or one other."

"Q. That is being paid every month?

"A. Yes." (Tr. R. 780).

Ever since January 28, 1939, the husband of Laura J. Shaw, M. A. Shaw, has been the president of both the Delaware and the Texas Pratt-Hewit corporations and during the same time has been a director of each one of those corporations. (Tr. R. 781). The Pratt-Hewit Corporation is dealing daily with the Houston Oil Co. The wife of the President of the two corporations and her sister and brother, even while this case is pending, are receiving checks each month from the Houston Oil Co. The bribery and the conflict between private interest and duty owed to the Pratt-Hewit Corporation still goes on with the sanction of the United States District Court and the United States Circuit Court of Appeals of the Fifth Circuit.

It is charged in plaintiff's second amended complaint, paragraph 21, that Pratt had received "about \$125,000 or more" from his 3/32 undivided interest. (Tr. R. 330). In the same paragraph

plaintiff, using what information Buckner had given, charged that Buckner paid Pratt \$18,000 for his 4/32 and the Houston Oil Co. paid Pratt \$50,000 for its 7/32.

The Houston Oil Co., in its answer (Tr. R. 371) to the said allegations in said paragraph 21 of plaintiff's second amended complaint, admitted the execution of said assignments by Pratt to the Houston Oil Co. and Buckner, and then stated that the assignments were reasonably worth the price paid—thus admitting that the price paid for the 7/32 was \$50,000 instead of \$32,500 as recited in the instrument. As to the allegations that Pratt received "about \$125,000 or more" the answer is silent and, therefore the allegations are admitted. How much more he may have received is not known.

(b) As to the September 28, 1925 Contract Unlawfully Delegating Powers Belonging to Directors of the Pratt-Hewit Corporation to the Directors of the Houston Oil Co.

By the September 28, 1925 contract the directors of the Pratt-Hewit Corporation unlawfully attempted to delegate all the powers and discretion vested in them by the charter of the corporation and the laws of Texas and Delaware, to strangers, the officials and directors of the Houston Oil Co., a competitor.

The following two paragraphs of the September 28, 1925 contract show that Pratt and his co-direc-

tors attempted to abdicate their right and their duty to manage the affairs of their corporation to the directors of the Houston Oil Co:

“Upon the conveyance to Third Party (Houston Oil Co.) by First Party (Pratt-Hewitt Corporation) of said undivided one-half ($\frac{1}{2}$) interest, Third Party shall have the EXCLUSIVE RIGHT TO OPERATE AND PRODUCE oil, and/or gas, from the wells on said property, and to the use of the equipment used in connection with said wells, and to contract to sell, and sell such production, receive the proceeds of sale, and do any and all things in connection with the handling and management thereof AS THIRD PARTY MAY DEEM BEST. THIRD PARTY SHALL ALSO HAVE THE EXCLUSIVE RIGHT TO DRILL OTHER WELLS for the production of oil and/or gas, on said property, and Third Party shall proceed to develop and produce oil and/or gas therefrom as and IN THE MANNER THIRD PARTY MAY DEEM BEST. *The intention being that the opinion and judgment of Third Party as to such developments SHALL CONTROL.*

“All of the costs and expenses incurred by Third Party in operating and producing oil and/or gas from the wells now on said property, and in drilling additional wells and producing oil and/or gas therefrom, and in marketing such oil and/or gas and ALL other COSTS AND EXPENSES incident thereto, by reason thereof, SHALL BE BORNE ONE-HALF ($\frac{1}{2}$) BY FIRST PARTY AND ONE-HALF BY THIRD PARTY. The proceeds of the sale of the oil and/or gas, from all such wells shall be owned

one-half ($\frac{1}{2}$) by First Party and one-half ($\frac{1}{2}$) by Third Party." (Tr. R. 880-881).

An analysis of the astounding provisions of these two paragraphs will show that the directors and officials of the Pratt-Hewit Corporation, by this contract, divested themselves of all power, authority and discretion, leaving with themselves nothing more than a clerical function namely, to distribute profits to the stockholders of the Pratt-Hewit Corporation if and when the Houston Oil Co. should turn any over to them. From September 28, 1925 until the trial of this case, which was about March 1, 1941, a period of about fifteen and a half years, the officials of the Pratt-Hewit Corporation have had the privilege of distributing profits eight (8) times, as follows: "four paid in 1940, one in 1939, and the other four were paid prior to that." (Tr. R. 707). The total amount distributed during the period of 16 years from 1925 to 1941 was only $8\frac{1}{2}\%$. Why should there be any annual meetings of stockholders for the election of directors when the management of the affairs and business of the corporation is vested in the officials and directors of the Houston Oil Co.? There is no time limit in the contract. If it is valid, it will be effective as long as oil and gas is being produced.

(c) As to the September 28, 1925 Contract Violating the Usury Statute of Texas.

The September 28, 1925 contract was neither an oil and gas lease nor an oil and gas operating contract, but was nothing more than a contract for the

loaning of money by the Houston Oil Co. to the Pratt-Hewit Corporation. (Exhibit 4, Tr. R. 876). In fact the interest was far more than 6 per cent but that rate plus a $\frac{1}{2}$ interest in 23,000 acres of oil and gas leases with the two large producing gas wells on the acreage, much drilling equipment, pipe line, etc., thus bringing the interest rate far above the 10 per cent allowed by Texas Statutes.

The contract called for four loans to be executed to the Pratt-Hewit Corporation by the Houston Oil Co., each provided for interest at six percent, was made payable at a definite time, and each note was secured by the Pratt-Hewit Corporation giving a mortgage on all of its property, real and personal, to Houston Oil Co.

For the making of these loans, the Houston Oil Co., in the September 28, 1925 contract, exacted a bonus from the Pratt-Hewit Corporation in requiring the latter to convey to it an undivided $\frac{1}{2}$ interest in 23,000 acres of oil and gas leases owned by the Pratt-Hewit Corporation which had on the acreage two big producing natural gas wells, each capable of delivering into the pipe line about 80,000,000 cubic feet of gas each 24 hours (Tr. R. 836), and a $\frac{1}{2}$ interest in all the drilling and other equipment of the Pratt-Hewit Corporation.

The loans extended to the Pratt-Hewit Corporation by the Houston Oil Co. were all paid when they became due.

There was one provision in the September 28, 1925 contract which provided that as to the said two gas wells, No. 4 and No. 6, drilled and brought in by the Pratt-Hewit Corporation itself before the September 28, 1925 contract was executed, the proceeds from the first production coming from these two wells, to the extent of the value of \$120,000, the Houston Oil Co. (it being in complete charge of this production, pursuant to the provisions of said contract) was to apply the same to the paying to itself the principal and interest of the four loans provided for in said September 28, 1925 contract.

This taking over of \$120,000 worth of natural gas by the Houston Oil Co. and applying it on the loans Pratt-Hewit Corporation owed it, can in no wise be deemed a consideration validating the September 28, 1925 contract. . . . All of the \$120,000 worth of gas was to come from the gas underneath the leases and the two producing wells which were the property of the Pratt-Hewit Corporation and in which the Houston Oil Co. had no interest, and never had an interest. To argue that the one-half of this production is the property of the Houston Oil Co. is to assume that the said contract is valid which is the subject in dispute and, therefore, begs the question at issue. It is no detriment or sacrifice of a single dollar for the Houston Oil Co. to give back to the Pratt-Hewit Corporation that which the Pratt-Hewit Corporation had just given it and which, in the first place, the Houston Oil Co. had no right to exact from the Pratt-Hewit Corporation because forbidden by the usury

statutes of Texas, Art. 5069, of the 1925 Texas Statutes, which says:

“Usury is interest in excess of the amount allowed by law (10 percent); all contracts for usury are contrary to public policy and shall be void.”

Not one single dollar of its own money, therefore, was paid by the Houston Oil Co. for the one-half interest which was attempted to be conveyed to it by Pratt and his co-officials in the making of the September 28, 1925 contract. Consequently the $\frac{1}{2}$ interest conveyed to Houston Oil Co. by the Pratt-Hewit Corporation must be considered to be interest.

(d) The Contract Violating the Anti-Trust Law.

The two paragraphs of the September 28, 1925 contract, which, as has just been seen, have just been quoted as unlawfully delegating to the officials and directors of the Houston Oil Co. the management of the affairs of the Pratt-Hewit Corporation which is vested by the charter of the Pratt-Hewit Corporation under the laws of Delaware and Texas, with the directors and officials of the Pratt-Hewit Corporation, also violates the anti-trust laws of Texas. The effect of said contract and its two paragraphs just mentioned has been to put under one single management, namely, that of the officers and directors of the Houston Oil Co., the production, marketing, and complete disposi-

tion of all the oil and gas which has been produced and is being produced under the 23,000 acres of oil and gas leases which originally consisted of approximately 22,000 acres of oil and gas leases.

Under the September 28, 1925 contract, the Houston Oil Co. has the right to say when or where, or if any wells should be drilled on the 23,000 acreage of oil and gas leases. Furthermore, by the same contract, the Pratt-Hewit Corporation had contracted away its right to market and determine the price at which the Pratt-Hewit Corporation sold its gas and oil. The evil of the situation became more evident and far more serious when the Houston Oil Co. sold the gas to the defendant, the Houston Pipe Line Company, when, as a matter of fact, the Houston Pipe Line Company is the mere instrumentality, the second self, the alter ego of the Houston Oil Co. This charge made by petitioners in paragraph 28 of plaintiff's Second Amended Complaint, is not denied by the Houston Oil Co. Thus the Houston Oil Co. sold this gas to itself and fixed the price.

"Paragraph 28 of plaintiff's second amended complaint reads as follows: (Tr. R. 336-337).

"(28) The plaintiff alleges the allegations in this paragraph upon information and belief, as follows: The Houston Pipe Line Company is the second self—the alter ego—of the Houston Oil Company. The latter owns all the stock of the former and brought about its incorporation and furnished it with funds. The two com-

panies have the same directors, except that the Houston Pipe Line has fewer in number. The two companies have the same secretary and treasurer. They also have the same office files and occupy the same office space. Each year the two companies issue a joint financial set-up. The officers and directors of the parent company, the Houston Oil Company, dominate and control the affairs and business of the Houston Pipe Line Company so that the latter is but a mere instrumentality and a screen for the other. The Houston Pipe Line Company on or about March 12, 1925 was organized by the Houston Oil Company about the same time that the contract of September 28, 1925 was being contemplated by the officials of the Houston Oil Company and Thomas H. Pratt. The natural gas which the Houston Oil Company, since September 28, 1925, produced and now produces from the wells it operates on the Pratt-Hewit Oil Corporation (Delaware) properties, is sold by the Houston Oil Company to the Houston Pipe Line Company which perpetrates a fraud, in that it represents that it is selling the gas of the Pratt-Hewit Oil Corporation (Delaware) to a third, separate and distinct party, when, in fact, the transaction means a sale of gas to itself and that the Houston Oil Company is both buyer and seller and has absolute power to fix the prices and also to make a charge in the nature of a profit in the marketing of the gas which the September 28, 1925 contract forbade. Plaintiff alleges on information and belief that these facts Thomas H. Pratt knew and the directors of the Pratt-Hewit Oil Corporation (Delaware) now know, but they have never informed the stockholders of such a condition, nor have they ever made an attempt to correct the same.

The answer of the Houston Oil Company and the Houston Pipe Line to that paragraph is given in the record on pages 373 and 374, Tr. R. as follows:

“(28) As to Paragraph 28 thereof; and (Tr. R. 373)

“(29) As to Paragraph 29 thereof:

“these defendants allege that the Houston Pipe Line Company is a separate and distinct corporation from the Houston Oil Company of Texas, and that it was incorporated under the laws of the State of Texas, and that though some of the officers and directors of the two corporations are the same, each has its own offices and records, and each conducts its own business, and that Pratt-Hewitt Oil Corporation has always been credited with the fair reasonable and adequate price for all of the oil and gas produced from the properties covered by the contract, and in accordance with the contract, and these defendants deny that said contract was fraudulently entered into and they deny that any transactions thereunder have been made in fraud; and these defendants further deny that the proceeds which the Houston Oil Company of Texas has acquired by reason of the production of oil and gas from the properties covered by the contract are owned by anyone else, and these defendants say that such proceeds are not held in trust for any one else.” (Tr. R. 374).

SOME ADDITIONAL EXPLANATORY FACTS

This was an oil venture promoted by Thomas H. Pratt and one W. E. Hewit. It was started in 1920. The enterprise was financed by selling oil and gas lease acreage located in Refugio County, Texas, to investors who, with a few exceptions, lived in Wisconsin. Although at that time there was no commercial production of either oil or gas in Refugio County, and leases, therefore, had no market value, nevertheless, the lease acreage, as testified to, sold at a price ranging from \$25 to \$100 per acre. (Tr. R. 609 and 739-741). Mr. Vaughan, the attorney for the Pratt-Hewit Corporation, stated in court that there were approximately 500 lease acreage purchase contracts made. (Tr. R. 675). If the average number of acres purchased by each investor was 20, and the average price paid per acre was \$50 per acre, then the total amount raised was \$500,000. The records of these purchases of acreage were not available because they were destroyed when the shack in the oil field at Refugio in which they were kept was destroyed by fire in 1923. (Tr. R. 610, 611).

In 1923 the Pratt-Hewit Corporation (Delaware) was organized with a capitalization of 5,000,000 shares, each of the par value of One Dollar. The stock distribution was substantially as follows: Pratt, 1,125,000; Hewit 1,125,000; lease acreage buyers who furnished all the money with which the enterprise was financed, 1,125,000; about 325,000 shares for services rendered by various other parties;

and about 500,000 left in the treasury of the corporation.

In July, 1924 Pratt had Hewit ousted as president and member of the board of directors. This left Pratt in sole charge of the affairs of the Pratt-Hewit Corporation.

Pratt's daughter, Laura J. Shaw, and her husband, M. A. Shaw, and daughter, Frances R. Webster, and the son, George P. Pratt, were made defendants because they received most of Pratt's stock by gift or by inheritance. They are residents of Nebraska and could not be served, and refused to make their appearance voluntarily. The second amended complaint asked for cancellation of Pratt's stock. Consequently, the son and daughters and the husband of Laura J. Shaw, and M. A. Shaw, all of whom had received stock, were proper but not indispensable parties.

The Pratt-Hewit Corporation (Delaware) and Pratt-Hewit Corporation (Texas), through their officials, which are the same, vigorously fought this action because no demand was made upon them before the action was instituted. Plaintiffs, however, had specifically set out in the second amended complaint why no demand was first made and further, gave reasons why it would have been futile to have done so. However, in the Circuit Court of Appeals, the two Pratt-Hewit corporations filed a short brief of 12 pages containing no legal argument, but only explanatory statements and prayed as follows:

“That this Court render, under the facts and law applicable to this case, whatever judgment it deems proper, and if these defendants are entitled to any recovery herein, directly or indirectly, that such recovery be adjudicated to them.”

(The foregoing prayer of the two Pratt-Hewit corporations, as contained in their brief in the Circuit Court of Appeals, automatically eliminated a number of legal questions).

The defendant, Pratt-Hewit Corporation of Texas, was organized in 1930 by the defendant, Pratt-Hewit Corporation of Delaware. With the exception of four or five shares, the latter owns all the stock of the former. The attorney for the two corporations, Ben F. Vaughan, Jr., admitted that the Pratt-Hewit Oil Corporation of Texas is the alter ego of the Pratt-Hewit Corporation of Delaware. (Tr. R. 745-747).

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of Texas and was argued by counsel on the 9th day of November, 1942. (Tr. R. 1043). On the 8th day of January, 1943 the Circuit Court of Appeals affirmed the decision of the District Court. (Tr. R. 1041). On January 29, 1943 a petition for rehearing was filed, (Tr. R. 1041) which was denied, without opinion, on February 17, 1943. (Tr. R. 1082).

It is from said judgment of the Circuit Court of

Appeals, Fifth Circuit, that petitioners apply to this Honorable Court for a writ of certiorari.

II

JURISDICTION

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in this case on certiorari by virtue of 28 U. S. C., Section 347 Jud. Code, section 240, amended) and also by virtue of Rule 38, 5(b) of the Revised Rules of this Honorable Court.

The amount in controversy in this case is greatly in excess of \$3,000, for it was testified that approximately 60, or more, wells have been drilled on the leases involved in this case.

III

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals has decided an important question of local law in affirming the judgment of the District Court because that Court found "no fraud" in the evidence adduced at the trial by plaintiffs, thereby holding that the question of whether there was or was no fraud is the deciding issue of the case, is in a way probably in conflict with the law which obtains in Texas which says that when an officer of a corporation, or any other

fiduciary, places himself in a position where self-interest conflicts with duty, that moment the fiduciary relationship comes to an end regardless of whether the contract or the transaction was fair or unfair, or whether the transaction was unaccompanied by any damage and that "a court of equity does not concern itself with the question whether the opportunity was embraced and the principal lost no money." That is what was held by the Supreme Court of Texas in the case of *Nabours v. McCord*, 97 Tex. 526, 80 S. W. 595-598.

2. Whether the Circuit Court has decided an important question, by holding that, before a fiduciary's relationship to his beneficiary may be terminated, it must first be shown that the fiduciary has perpetrated a fraud upon the beneficiary, a question of exceedingly great importance, because it lies at the basis of the law pertaining to fiduciaries and cestui que trusts wherever that relationship arises, in a way in conflict with the principle followed by this Court when it said, in the case of *Wardell v. Union Pacific Ry. Co.*, 103 U. S. 651, 26 L. Ed. 509:

"Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of the parties they represent and are bound to protect."

Said decision is likewise, in conflict with universal-

ly accepted infallible principle of human conduct that a man cannot serve two masters.

3. Whether the decision of the Circuit Court is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit concerning the same legal proposition involved in the case of *Fleishhacker v. Blum*, 109 F. (2d) 543, and also whether it is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit on the same legal question in the case of *Shell Petroleum Co. v. Pratt*, 100 F. (2d) 833, which are to the effect that the Court will not listen to proof of honest intent, good faith, or that the beneficiary suffered no injury, but will set the contract aside. In the instant case the Circuit Court affirmed the judgment of the District Court because Pratt perpetrated no fraud, and, therefore, could not be disqualified from representing his corporation in his dealings with the Houston Oil Co.

4. Whether the Circuit Court has decided an important question of local law in holding that there was no fraud and thereby dismissing the case, and in its failing to mention or discuss the question which was presented to it, namely, whether the September 28, 1925 contract unlawfully delegated to the directors and officials of the Houston Oil Company the right to manage the affairs of the Pratt-Hewit Corporation, and thereby answering said question in the negative, is in conflict with the charter of said corporation, and also in conflict with the

applicable statutes and decisions of the courts of Texas, including its Supreme Court.

5. Whether the Circuit Court of Appeals, in failing to pass upon the issue of whether the officials of the Pratt-Hewit Corporation had contracted away their right and duty to manage the affairs of their corporation to the directors of the Houston Oil Co., thereby impliedly answering in the negative a question of great corporate and economic importance is in a way, probably in conflict with the decisions of this Court, as held in the case of *Thomas v. R. R. Co.*, 101 U. S. 71, and other decisions of this Court on the same question.

6. Whether the decision of the Circuit Court in its failure to pass on the question of whether the September 28, 1925 contract unlawfully delegated powers to the directors of the Houston Oil Co., and by its failure to pass on that question impliedly answered it in the negative, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Sherman-Ellis, Inc. v. Indiana Mutual Gas Co.*, 41 F. (2d) 588, in which the same question was answered in the affirmative. Silence, as well as a written opinion, on decisive issues may create a conflict of decisions.

7. Whether the Circuit Court has decided an important question of local law presented to it, that is, did the September 28, 1925 contract violate the Usury Statutes of Texas, and by its failure to pass on that question has impliedly answered it in the negative, in conflict with the Texas Usury Sta-

tutes and the applicable decisions of the Supreme and other courts of Texas.

8. Whether the Circuit Court has decided an important question of local law presented to it, whether the September 28, 1925 contract violated the monopoly and anti-trust statutes of Texas, and by its failure to pass on that question impliedly answered it in the negative, has given a decision in conflict with the monopoly and anti-trust statutes of Texas and the applicable decisions of the Supreme Court and other courts of Texas.

9. Whether the decision of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the District Court as to call for an exercise of this Court's power of supervision in that

(a) the decision of the Circuit Court is misleading, in making it appear that the issue in the case is a question of fact, and the District Court having found that there was no fraud, the finding would be as conclusive on the Circuit Court of Appeals as if it had been the finding of a jury, when the record clearly shows that the facts are undisputed and that the issues are all questions of law;

(b) the four questions not answered by the Circuit Court raised jurisdictional questions and lack of jurisdiction is one which every court should consider whenever and however it is raised; and

(c) answering the four questions presented by the pleadings and the undisputed evidence and exhibits in the case by implication, that is, by not discussing them, is contrary to long settled procedure of courts and unconstitutionally denies petitioners of their right to relitigate said questions.

IV

REASONS RELIED ON FOR THE ALLOW- ANCE OF THE WRIT

As to "Question Presented No. 1," the affirmance by the Circuit Court of the District Court's finding that there was "no fraud," shown in the evidence adduced at the trial of the case, is directly in conflict with the decision of the Supreme Court of Texas in the case of *Nabours, et al v. McCord, et al*, 80 S. W. 595, which is to the effect that a fiduciary's right of representation of his beneficiary comes to an end the moment the fiduciary places himself in a position where self-interest conflicts with duty, and that when such conflict is shown the Court will not stop and determine first whether the beneficiary has been damaged, or the fiduciary has profited, or whether the transaction or contract was fair or unfair.

In this case the Supreme Court of Texas said:

"No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

“The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors.” p. 600.

Quoting from the case of *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 33, the Supreme Court of Texas further said:

“The rule forbidding conflict between interest and duty is no respecter of persons. It imputes constructive fraud, because the temptation to actual fraud, *and the facility of concealing it*, are so great. And it imputes it all alike, who come within its scope, *however much or however little* open to suspicion of actual fraud. Equity does not so much consider the bearing or hardship of its doctrine upon particular cases *as it does the importance of preventing a general public mischief*, which may be brought about by means *secret and inaccessible to judicial scrutiny*, from the dangerous influences arising from the confidential relation of the parties. The principle applies, however innocent the purchaser may be in a given case.”

In Texas, officers and directors of corporations are trustees. “In the case of *San Antonio & G. S. R. Co. v. San Antonio & G. R. Co.*, 60 S. W. 338, writ of error was refused, it was said; ‘Directors of a corporation occupy toward them the position of trustees, and their acts in connection with the property of the corporation as controlled by the principles governing other trustees, and the obligations of the trusteeship are made the basis for the ascertainment of what acts on the part of directors will

constitute a fraud, and the remedies that may be applied.'

Other Texas cases are to the same effect, and in no case is the correctness of that statement questioned." Hildebrand's, Texas Corporations, Vol. 3, p. 2, section 681 (Published 1942)

Justice Cardoza, while on the New York State Bench, in one of his outstanding opinions, clearly stated the principle followed by the courts in all jurisdictions when he said:

"Finally, we are told that the brokers acted in good faith, that the terms procured were the best obtainable at the moment, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer to a trustee forgetful of his duty. The law 'does not stop to inquire *whether the contract or transaction was fair or unfair*. It stops the inquiry when the relation is disclosed, (conflict of self-interest with duty) and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, *without undertaking to deal with the question of abstract justice in the particular case*.' (Munson v. Syracuse, G. & C. R. Co., 103 N. Y. 58, 74)

") Only by this *uncompromising rigidity* has the rule of undivided loyalty been maintained against *disintegrating erosion*." Wendt v. Fischer, 243 N. Y. 328, 443, 154 N. E. 303, 304.

While the phraseology is somewhat different, nevertheless, the principles laid down in the case of *Nabours, et al v. McCord et al* (supra) is the same as the principles followed by Justice Cordoza in the case of *Wendt v. Fischer* (supra). Each case is to the effect, *first*, that the moment when self-interest conflicts with duty the fiduciary's right of representation comes to an end, and, *second*, that the court goes no further for the purpose of ascertaining whether there was fraud, or that the violation of duty by the fiduciary was accompanied by damage but sets aside the transaction or contract and refuses to enforce it.

Thus, the question which was presented to the District Court and also to the Circuit Court whether Pratt had placed himself in a position where self-interest conflicted with duty, has not been passed upon directly by either the District Court or the Circuit Court. The fact that said two courts did not mention said principle must be taken to mean that both of said courts hold that before a fiduciary may be disqualified from representing his beneficiary it must be shown that a fraud has resulted from the fiduciary attempting to serve dual interests.

As to Question No. 2, there is an important public interest reason why the principles of law as pronounced by this Court in *Wardell v. Union Pacific Ry. Co.* (supra) and in many other cases, by the case of *Nabours v. McCord* (supra) and by Justice Cordoza, and not the new principle by which the District Court decided the case at bar and which principle was approved and affirmed by the Circuit Court of

Appeals, should be adhered to by all courts with such inflexibility and stubbornness because it lies at the base of every type of fiduciary relationship. Even any slight relaxation would result in endless confusion and much litigation. Furthermore, the frailty of human nature when tempted dictates its enforcement with extreme rigidity.

In the very recent case of *Blaustein v. Pan American, etc.*, 21 N. Y. S. (2d) 651, 722, involving the Standard Oil Company of Indiana and its subsidiary, Judge Rosenman said:

“The rule is based upon the public policy of removing temptation completely from the office of fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty that prevailed. Different courts have defined this rule in different words, but in unanimity of substances.”

In the case of *Wile, et al v. Burns*, 265 N. Y. S. 461, the court said:

“They say that they have clearly established that no one occupying a fiduciary relation, such as that of director of a corporation, should place himself in a position where his self-interest *will* or *may* conflict with his duties as trustee, and that, if he does do so, his right to represent his cestui ceases at once.

“Authority for that proposition is to be found in *Munson et al v. Syracuse, Geneva & Corning Railroad Co.*, 103 N. Y. 58, 74, 8 N. E. 355, 358,

in which the court said: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be, impossible, *knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.* The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealings on the part of the trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal representative."

In the case of *West v. Camden*, 135 U. S. 507, 10 S. Ct. 838, 34 L. Ed. 254, the agreement was one made personally by a director and stockholder of defendant corporation that West should be permanently retained as vice-president of that company. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in personal liability for damages, the agreement was of a character to place defendant's personal in-

terests in possible conflict with the best interests of the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void as against public policy, even though there would not have been any direct gain from the promisor, the defendant.

The facts thus clearly disclose that this contract was against public policy and void for one sole reason, that is, it placed defendant's interest in direct conflict with the duty he owed to his corporation's stockholders.

"The rule is founded on the danger of imposition and the presumption of the *existence of fraud inaccessible to the eye of the court*. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." *Nabours v. McCord*, 80 S. W. 595, 598, 599 (Tex. Sup. Ct).

In the same case of *Blaustein v. Pan American, etc.*, (supra) p. 717, Justice Rosenman, in discussing the case of *Jackson v. Smith*, 254 U. S. 56, said:

"It thus appeared that even though the estate was not injured, since no higher bid could have been obtained; that even though there were no prospective profits taken away from the cestui; that even though Wilson's bid was not influenced in any way by the trustee; *the mere fact that the trustee had placed himself in a position where*

self-interest conflicted with the interest of the cestui was sufficient to cause the whole transaction to be set aside."

Question 3. The decision of the Circuit Court in sustaining the finding of the District Court that there was *no fraud* and, therefore, dismissing the case, implied that it was necessary to charge and prove that Pratt had been guilty of fraud before he would be disqualified from representing the Pratt-Hewit Corporation.

(a) is in conflict with the Circuit Court of Appeals for the Ninth Circuit in the case of *Fleishhacker v. Blum*, 109 F. (2) 543 on the same legal question, and in which that court affirmed the case insofar as it affected Fleishhacker, and in which said District Court said: *Blum v. Fleishhacker*, 21 F. Supp. 527.

"The law will not allow private profit from a trust, and will not listen to any proof of honest intent, or proof that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the cestui que trust."

In the same case the District Court further said, in its opinion:

"It is further contended that Herbert Fleishhacker acted in the highest good faith for the protection and benefit of the Anglo and that the two loans were highly desirable to the bank; that there was no secrecy in Fleishhacker's participation in the steel venture.

Court held that this was no defense.

(b) is in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit on the same matter in the case of *Shell Petroleum Co.*, 100 F. (2d) 833 in which the Court said:

"It must be held upon plain principles of reason and sound public policy that an agent occupying a place of trust and confidence is not permitted to put himself in a position in which his personal interest may conflict with his duty to his principal. He cannot assume a position which may afford the temptation to subordinate the interests of his principal to those of himself in the discharge of his duty. In order to be free from temptation *he is disabled from placing himself in such a position.* *United States v. Cartel*, 217 U. S. 286, 30 S. Ct. 515, 54 L. Ed. 769; *Commonwealth Finance Corp. v. McHarg*, (2 Cir.) 282 F. 560."

"... . It is further insisted that a trust should not have been imposed for the reason that *there was no proof that plaintiff suffered detriment or damage* as the result of defendant acquiring the mineral rights. In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed, and that it was breached must be clear, convincing, and trustworthy. *Colorado & Utah Coal Co. v. Harris*, 97 Colo. 309, 49 P. (2d) 429. But such a trust 'is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, *equity converts him into a trustee.*' *Beatty v. Guggenheim Exploration Co.* 225 N. Y. 380, 122 N. E.

378, 380; Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 54 A. L. R. 1173. *It was not necessary for plaintiff to show that it suffered detriment, injury, or damage.* The law was indutiably contravened by the creation of a stituation which lent inducement or temptation for wrongdoing; and *a court of equity does not concern itself with the question whether the opportunity was embraced and the principal suffered actual injury.* Hoyt v. Latham, 143 U. S. 553, 12 S. Ct. 568, 36 L. Ed 259; Robertson v. Chapman, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592; United States v. Dunn, 268 U. S. 121, 45 S. Ct. 451, 69 L. Ed. 876; Turner v. Kirkwood, (10 Cir.) 49 F. (2) 590; Daus v. Short, *supra*; Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, p. 160.

Question 4. The decision of said Circuit Court of Appeals affirming the decision of the District Court in dismissing plaintiffs' cause of action on the sole ground that "there was no fraud," and in failing to pass on the question whether the September 28, 1925 contract unlawfully delegated the managing rights of the officers of the Pratt-Hewit Corporation to the directors of the Houston Oil Co. is a decision of local law in a way probably in conflict with the following statutes and decisions of the courts of Texas:

ART. 1327 Texas Vernon Statutes:

"The directors shall have the general management of the affairs of the corporation, etc." (See many cases cited in note).

"The general management of the affairs of a corporation having been intrusted by the legislature to the board of directors, it accords with the general principle to hold that their functions may not be delegated to others." 10 Tex. Jur. 954, Section 303.

"Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint agents, whether in the form of committees or as single agents, to transact the ordinary business of the corporation; *but we believe that the rule is well settled by authority, and sustained by sound principle, that a board of directors cannot confer upon others the power to discharge duties imposed upon them which involved the exercise of judgment and discretion, except in the transactions of ordinary business of the corporation, unless authorized so to do by the charter.* Thomp. Corp. sect. 3944 et seq.; Green's Brice, *Ultra Vires* pp. 490-492; *Railroad Co. v. Richie*, 40 Me. 425; *Tippets v. Walker*, 4 Mass. 595; *Weidenfeld v. Railroad Co.*, 48 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the president, for the board of directors, *and attempted to confer upon that committee all powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the by-laws would be null.*" *Temple v. Dodge et al*, 32 S. W. 514 (Supreme Ct. of Texas).

"The power to manage the affairs of the corporation was placed by statute and by charter in the board of directors (Art. 1327 R. S. Texas, 125), and such authority cannot be delegated to another (*Temple v. Dodge*, 32 S. W. 514, 33 S. W. 222), and those who deal with a corporation are charged with knowledge of the limitations upon its powers prescribed by its charter." *Farmers' Gin Co. v. Kasch*, 277 S. W. 746, 749 (Tex. Civ. App.).

Furthermore, in *Temple v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222, it was held, that the board of directors cannot delegate to others authority to discharge the duties imposed upon them by law, involving the exercise of judgment and discretion except in the transaction of ordinary business of the corporation unless authorized so to do by its charter. To the same effect, see *Fletcher on Private Corporations*, Vol. 3, p. 31, 48." *Marchman v. McCoy Hotel Operating Co.*, 21 S. W. (2d) 552, 558 (Tex. Civ. App.)

"The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors, except as hereinafter or in its certificate of incorporation otherwise provided, etc." *Corporations Art. 2041, sec. 9, Revised Code of Delaware, Laws of 1935.*

The two paragraphs of the September 28, 1925 contract by which the said contract unlawfully delegates to the directors and officials of the Houston Oil Company the right to manage the business

affairs of the Pratt-Hewit Corporation are set out in full and a discussion of them is to be found on pages 25-30, inclusive, of appellants' Motion for Rehearing and pages 1068-1073 of the Transcript of Record. In order to avoid repetition, these page references to the appellants' Motion for Rehearing and Transcript of Record are given.

The said two paragraphs of the September 28, 1925 contract are also set out in the Summary Statement of Matters Involved on pages 17-18 of this Application for Certiorari, followed by a short discussion.

Question 5. The decision of the Circuit Court of Appeals in its failure to pass upon the question presented to it, held that the September 28, 1925 contract was not void even though the contract delegated to the directors of the Houston Oil Co. the right to manage the affairs of the Pratt-Hewit Corporation, an important question, not only as to the State of Texas but to the public in general, is not only in conflict with the statutes of Texas and the decisions of the courts of this state but is also in conflict with what has been held by courts in all jurisdictions and in particular in the case of *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950.

The plaintiff Thomas, in the foregoing case, brought an action to enforce a contract which was in the form of a 20 year lease in which he was lessee and the Railroad Company lessor. The Railroad Company was the original owner. It had leased all its properties, including its franchise, for a period of 20 years to Thomas, from whom in return

it received as rent one-half of all gross earnings of the road. The usual right of entry was reserved to the Railroad Company in case Thomas breached his contract, etc. In the Circuit Court of Appeals Thomas offered to prove that he had complied with the provisions of the lease and prove his damage. But the Court excluded the testimony offered on the grounds the lease was *ultra vires* and directed the jury to return a verdict for the defendant Railroad Company. The Supreme Court of the United States affirmed the judgment. The following are quotations from the opinion: On page 83, the Court said:

“ . . . a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

“

“There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

“That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the conditions of the public grant, any contract which disables the corporation from performing those

functions which it undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

The contract in the foregoing case of *Thomas v. Railroad Co.* is not as drastic as is the September 28, 1925 contract in the case at bar. The *Thomas v. Railroad* contract provides for a definite period of 20 years. The other does not, but continues as long as oil and gas is produced from the 23,000 acres of oil and gas leases involved in the September 28, 1925 contract. In the *Thomas v. Railroad* contract the railroad company was entitled to receive as rent one-half of the *gross income*. In the other *Houston Oil Co.* is obliged to turn over only such sums of the earnings as the *Houston Oil Co.* in its judgment alone shall deem to be net earnings and to decide when dividends, if any, may be paid to the stockholders of the Pratt-Hewit Corporation. That is a function which the directors of one corporation may not delegate to the directors of another. In the *Thomas v. Railroad Company* case, "a right of re-entry (was given) on the failure to perform covenants in addition to the special right to terminate the lease on notice."

No such right of re-entry, or termination of the contract is contained in the September 28, 1925 contract.

Question 6. The decision of the Circuit Court of Appeals which by its failure to answer the question presented, whether the September 28, 1925 contract delegating to the directors of the Houston

Oil Co. the right to manage the affairs of the Pratt-Hewit Corporation is lawful, is in conflict with the decision of the Circuit Court of Appeals for the 7th Circuit in the case of *Sherman & Ellis, Inc. v. Indiana Mutual Casualty Co. et al*, 41 F. (2d) 588, in which the court said:

"It is true the statutes of the states authorizing the organization of corporations are of a general application and are easily complied with. Yet we cannot believe that the requirements therein found or the official duties therein prescribed are mere formalities or only directory in character. *The grant of a corporate power by a state is upon the hypothesis that these powers shall be exercised by the corporation's officers, annually elected by the stockholders and not by the officers of another corporation. Anglo-American Land, etc. Co. v. Lombard (CCA) 132 F. 721, 736.*"

To the same effect is the case in the 7th Circuit, *McCutcheon v. Merz Capsule Co.*, 71 F. 787, 792 (CCA 6th).

Question 7. The decision of the Circuit Court of Appeals in failing to decide the question in its written opinion presented to it, namely, whether the September 28, 1925 contract violates the usury statutes of Texas, Articles 5069 and 5071, R. S., 1925, and the applicable decisions of the Supreme Court of Texas, and thereby answering said question, by inference, in the negative, is in conflict with said statutes of Texas and the decisions of the Supreme Court of said state construing said statutes. Said statutes read as follows:

“Art. 5069. Usury is interest in excess of the amount allowed by law (10 percent): *all contracts for usury are contrary to public policy and shall be void.*”

“Art. 5071. The parties to any written contract may agree and stipulate for any rate of interest not exceeding ten per cent per annum, on the amount of the contract, and all written contracts whatsoever, which may in any way, *directly or indirectly*, provide for a greater rate of interest shall be void and of no effect for the amount of the interest only; but the principal sum of money or value of the contract may be received.”

Judge Hutcheson of the Fifth Circuit Court of Appeals, and who is a member of that Court coming from Texas, in the case of *Atwood v. Deming Inv. Co.*, 85 Fed. 180, a suit involving the just quoted Texas statute, said:

“For us the statute (Article 5071) has the meaning which the highest court has given it. We follow where the Court has led.”

“The courts of Texas have always struck such contracts down, and neither sophistry of form nor substance has availed to save them. The reasons for this the Supreme Court of Texas in the cases referred to have been fully set out. We shall not attempt a restatement; a reference to those cases will suffice.”

“The language of the statute, that such contracts shall be void as to interest, is imperative and absolute, not prospective and conditional.

It provides not that the contract will, but that it shall, be void and of no effect as to interest. Such a statutory interdiction sweeps the provisions for interest out of the contract, and leaves it as though it did not stipulate for the interest." (p. 183)

The application of these statutes and decisions of the courts of Texas to the September 28, 1925 contract, means that the actual money, the principal checked out by the Houston Oil Co. out of its bank account must be and was paid back to the Houston Oil Co. by the Pratt-Hewit Corporation, for that part of the contract has the sanction of the law of Texas. The rest of the contract is completely condemned by the two Texas statutes just quoted and the decisions of the Texas Supreme Court. The void part includes two items which cover all the rest of the contract of September 28, 1925, namely, the 6 per cent interest provided for by the written loans and the undivided $\frac{1}{2}$ interest in all the real and personal property conveyed to the Houston Oil Co. by Pratt-Hewit Corporation, according to Texas laws, is interest, thus bringing the rate above the 10 percent allowed. This makes the contract, as to all the interest, the 6 per cent as well as the undivided $\frac{1}{2}$ interest conveyed to Houston Oil Co. by Pratt-Hewit Corporation, void. Thus, in fact, the Houston Oil Co. at no time acquired ownership of the $\frac{1}{2}$ interest it received from the Pratt-Hewit Corporation.

In the case of *Manning et al v. Christianson et al* (Com. App. Tex.) 81 S. W. (2d) 54, the decision of

the Court of Civil Appeals was sustained when the Court said:

"Entire interest is usurious if any part of interest is usurious." 59 S. W. (2d) 234, in the following language:

"It follows, therefore, the Court of Civil Appeals correctly held that the contract was usurious and that all provisions with reference to interest were void."

In the case of *Shropshire v. Commerce Farm Credit Co.* (Tex. Sup. Ct.) 39 S. W. (2d) 11, one of the cases quoted by Judge Hutcheson in the *Atwood v. Deming Inv. Co.*, 85 Fed. (2d) 180, the Supreme Court of Texas said:

"The court recognizes its duty in determining the validity of the contract herein involved to apply the universally accepted rule declared in *Galveston Co. v. Guymes*, 63 S. W. 860, 861, 64 S. W. 778, in the following words: 'To determine the question of usury in a contract, it must be tried by the statutory limitation of 10 per cent, per annum for the use, forbearance, or detention of the money for one year. If the interest contracted for exceeds that rate, it constitutes usury, no matter in what form the contract may be expressed. The court must give to the terms of the contract, if fairly susceptible of it, a construction that will make it legal, but has no right to depart from the terms in which it is expressed to make legal what the parties have made unlawful.'"

That the contract was usurious and therefore

void, that question was presented and argued in appellants' Main Brief, pages 100 and 101, in Reply Brief, pages 16 to 19, and on pages 22 to 25 of appellants' Motion for Rehearing. (Tr. R. 1065-1068).

In the Summary Statement of the Matters Involved, on pages 18-21 of this Application for Writ of Certiorari, the September 28, 1925 contract is analyzed, showing that that instrument is nothing but a pure loan of money. The half interest conveyed to the Houston Oil Co. by the Pratt-Hewitt Corporation, of all its property, was a pure bonus for which the Houston Oil Co. paid no consideration, thereby bringing the rate of interest far in excess of 10%.

Question 8. The decision of the Circuit Court in failing to decide in its written opinion the question presented to it, namely, whether the September 28, 1925 contract violates the Monopoly and Anti-Trust statutes of Texas, and thereby answered the question in the negative, is in complete conflict with said Texas statutes and the decisions of the Supreme and other courts of Texas construing said statutes. Some of the statutes read as follows:

"A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the

purpose of producing, or when such management or control tends to create a trust as defined in the first article of this chapter." Texas R. S., Art. 7427; Pen. Code, 1925, Art. 1633.

"Art. 7426. TRUSTS.—A trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either or all of the following purposes:

"1. To create, or which tend to create, or carry out restrictions in trade or commerce or aids to commerce, or in the preparation of any products for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this state."

"2. To fix, maintain, increase, or reduce the price of merchandise, produce or commodities, or the cost of insurance, or the preparation of any product for market or transportation.

... ..

"6. To regulate, fix or limit the output of any article, or commodity which may be manufactured, mined, produced or sold, on the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation."

"It does not matter that parties to the unlawful combinations may not have been actuated by any bad motive, or that the public may have been temporarily benefited by it; such combina-

tion was incompatible with public policy." *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 125, 54 S. W. 289, Error refused, per Fly.

"Our anti-trust statutes have materially enlarged upon the common law. They denounce and make illegal, void and criminally punishable almost every conceivable kind of combination or contract which tends to restrict trade or commerce." 29 Tex. Jur. 749.

"The statute (Anti-Trust) ignores any distinction between restrictions that are reasonable and those which are not, and denounces both kinds." 29 Tex. Jur. 753, citing *Henderson Tire & Rubber Co. v. Roberts* (Com. App.) 12 S. W. (2d) 154, affirming 1 S. W. (2d) 510.

"Any contract or agreement in violation of the provisions of the anti-trust statutes of this state are absolutely void and unenforceable in the courts of this state. Rev. Civ. Statutes of Texas, 1925, Art. 7437." *Henderson Tire & Rubber Co. v. Roberts*, 12 S. W. (2d) 154.

"The act denounces combinations in restraint of trade and makes no distinction between restrictions which are reasonable and those which are unreasonable." *Anheuser-Busch Brewing Ass'n v. Houch*, (Tex. Sup. Ct.) 88 Tex. 184, 30 S. W. 869.

In the case of *New Century Mfg. Co. v. Schewer* (Tex. Com. App.) 45 S. W. (2d) 560, reversing 30 S. W. (2d) 388, the Commission of Appeals of the Texas Supreme Court said:

"The putting of alleged purpose into execution, is a public wrong, and courts will not speculate on the extent of resulting injury to the public."

"Monopolies are contrary to the genius of a free government, and shall never be allowed."
Texas Constitution, Art. 1, Sec. 26 in part.

The effect of the September 28, 1925 contract was put under one single management and entire control, namely, that of the officers and directors of the Houston Oil Co. the production, marketing, and complete disposition of all the oil and gas produced and to be produced until the 23,000 acres of oil and gas leases and the two producing wells shall be entirely depleted of oil and gas and other minerals, regardless of the number of years that it will require for completely exhausting all the oil and gas and other minerals from underneath said acreage, owned by the Pratt-Hewitt Corporation. What amount, if any, is to be produced, to whom should the oil or gas be sold, what the price was to be, etc., all was put under the full control of the directors and officials of the Houston Oil Co. and as to all of which the directors and officials of the Pratt-Hewitt Corporation were completely shorn of the right to be consulted. The effect of this contract was to eliminate completely and forever one of the competitors in the production and in the marketing of oil and gas in South Texas. The Houston Pipe Line being the alter ego of the Houston Oil Co. the latter sold the gas to itself. Houston Oil Co. sold the gas to itself.

The contract contains no provision requiring the Houston Oil Company to produce and pay for each year a minimum amount of either oil or gas produced. Thus, the contract purported to give to the Houston Oil Co., its officials and directors, sole power of determining just how much gas and oil should be produced annually on the 23,000 acres of land and to market the same.

The sum total of the contract, as its provisions so plainly portend, was that the entire future of the properties of, and the Pratt-Hewitt Corporation, itself, was placed under the absolute control of the Houston Oil Co. For this, the Houston Oil Co. paid no consideration. At that time, and to this day, the Houston Oil Co. was and is engaged in the production of both oil and gas in many fields.

The question whether the September 28, 1925 contract violates the Texas monopoly and anti-trust statutes was presented to the Circuit Court of Appeals in appellants' Main Brief, pages 144 to 146, Reply Brief, pages 24 and 25 and in the Motion for Rehearing, pages 30 to 33.

Also see in this application for certiorari under Summary Statement of Matters Involved, pages 21-24 where the September 28, 1925 contract is analyzed showing how it violates the Texas Monopoly and Anti-Trust laws.

eastern 9. Whether the decision of the Circuit Court

has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the District Court as to call for an exercise of this Court's power of supervision in the following:

(a) The short statement in the Circuit Court's decision is misleading in that it implies that the pleadings, and the evidence, and the exhibits present one issue of fact which is as conclusive upon the Circuit Court as the findings of a jury on issues of fact when the Court itself at different times stated that the defendants do not deny "that they (defendants) completed the transaction that you charge they completed," (Tr. R. 721) and made similar statements in its findings of fact and conclusions of law. As has already been seen, the issues presented by this case are pure questions of law.

A *fact* is—"an action; a thing done; a circumstance." Bouvier's Law Dict.

What was "done" that is, the acts complained of by the plaintiffs, is indisputably shown by Exhibits 9, 10, 10A, 11, 12, 13 and 37, written by Pratt, the Houston Oil Co. and Rooke and literally carried out by each one of them as agreed by these instruments, and as is further shown by the Houston Oil Co. extending personal loans to Pratt, as the books of the account of the Houston Oil Co. disclose, and as its supervising accountant, Mr. Fairbrother, testified. (Tr. R. 768-780)

While these acts, which have not and of course could not be disputed, showed a Judas betrayal by Pratt of his corporation, the Pratt-Hewit Corp., and its stockholders, abetted therein by the Houston Oil Co., thereby wholly negating the District Court's finding that there was no fraud and the Circuit Court's affirmation of that finding, nevertheless, that fraud of itself is not the determining answer of the issue presented, which is, did Pratt place himself in a position where his personal-self-interest conflicted with the duty he owed to his corporation and its stockholders, and therefore disqualify himself from negotiating the September 28, 1925 contract on behalf of the Pratt-Hewit Corp?

While Pratt's acts carried with them a heinous fraud, nevertheless, it is possible for an officer of a corporation to disqualify himself from acting in its behalf without being guilty of fraud. The following colloquy between the Court and counsel discloses that court's error of the law applicable to this case:

“THE COURT: (District Court) *They don't deny that they completed the transaction that you charge they completed. Now I want you to get down to the issue in the lawsuit and SHOW ME THE FRAUD.* I realize that you have plead here time and time again that the Houston Oil Company bought the official discretion of Thomas H. Pratt and thereby induced him to execute or cause to be executed this contract to convey half of the Pratt-Hewit properties to the Houston Oil Company. Now then you plead in your amended complaints that B. F. Rooke and his wife executed a lease to A. D. Rooke on 200

acres and that A. D. Rooke entered into a drilling contract with the Houston Oil Company and they were to drill a well or two wells on it and that A. D. Rooke then assigned half of the mineral rights under that 200 acres to Thomas H. Pratt and that Pratt then sold or pretended to sell $7/32$ to the Houston Oil Company for \$32,500 and $4/32$ to E. H. Buckner for \$18,000 and that he has $3/32$ left. *Now you contend that those things are circumstances to show that his official discretion was bought.*

“MR. BARTELT: Yes.

“THE COURT: *Now they don't deny the execution of those instruments. There is no dispute about it. Now let's get away from them. It is in evidence here that all those things were done. But they deny that it was done for the purpose for which you say it was done. Now I want you to please go ahead and put in this case, if you have any, evidence to show that that was fraudulent. If you have any evidence other than the making of those payments and the mere circumstance of the execution of those assignments, put it in here.*

“MR. BARTELT: First of all, we are putting in circumstances one by one, and this is one circumstance.

“THE COURT: *Now you just keep coming back to the same circumstance that is not disputed; that there is no dispute at all about.*

“MR. BARTELT: In the second place, *the gist of this action is this: that an officer of a corporation cannot have interests which will*

conflict with his duties to the corporation. He cannot represent the Pratt-Hewit Oil Corporation and be receiving these sums of money from the Houston Oil Company at the same time. We will also show, as has been stated here, that those instruments were kept off record.

“THE COURT: You argue that that is another circumstance. Now you have established that.

“MR. BARTELT: *And the burden of proof is on a fiduciary. The burden of proof is upon him.* (Tr. R. 721-723.)

Inasmuch as Pratt's private dealings with the Houston Oil Co. commenced at the time the September 28, 1925 contract was made, and continued every day until his death on September 3, 1938, those facts being admitted, the burden is cast upon the defendant, the Houston Oil Co., and other defendants, to prove that these acts were not fraudulent. Not one single authority was ever submitted by the defense, or by the District Court, or in defendants' brief, or in the opinion of the Circuit Court which would show or tend to show that the acts of Pratt and the Houston Oil Co. were legal.

In the very recent case of *Pepper v. Litton*, 308 U. S. 295 60 S. Ct. 238, 245 and 247, this Court said:

“A director is a fiduciary. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. Ed. 328. *So is a dominant or controlling stockholder or group of stockholders. Southern Pacific Co. v.*

Bogert, 250 U. S. 483, 492, 39 S. Ct. 533, 63 L. Ed. 1099. Their powers are powers in trust. See Jackson v. Ludeling, 21 Wall. 616, 624, 22 L. Ed. 492. Their dealings with the corporation are subjected to *rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. Geddes v. Anaconda Copper Mining Co. 254 U. S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425. . . .
""

""

"He (an officer of a corporation) who is in such a fiduciary position *cannot serve himself first and his cestui second*. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity *violate the ancient precept against serving two masters*." . . .
. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

The Court in its findings of fact No. 17 (Tr. R. 516-17) after reciting a part of exhibits 9, 10, 10A, 11, 12, 13, and 37 says this:

"As far as the record shows, these are *mere circumstances to which the plaintiff points with suspicion, but I fail to find any evidence of fraud in those transactions.*"

Then again in findings of fact No. 18 (Tr. R. 518) the Court again says:

"I think I have stated that the circumstances relied upon by the plaintiff and the intervenor to show fraud are mere suspicions so far as the record in this case shows and do not support the charges of fraud and overreaching and purchase of official discretion made in this case."

As to all this, including exhibits 9, 10, 10A, 11, 12, 13 and 37, and the loans extended to Pratt as the Houston Oil Co. books show, and all the other undisputed acts of Pratt and the Houston Oil Co., and further as to the District Court labeling all this evidence as "mere suspicion on the part of plaintiff," when this Court has said "the burden of proof lies with the dominant stockholder" the Circuit Court of Appeals says:

"The findings and the conclusions of the District Court are free from error and the judgment appealed from is affirmed." (Tr. R. 1042.)

Suppose the following two questions were put to a layman:

May an officer of a corporation while negotiating a contract for his corporation with X Company secretly accept personal loans of money from X Company?

May an officer of a corporation while negotiating a contract with X Company for his corporation,

secretly accept a conveyance of $\frac{1}{2}$ interest in an oil and gas lease from a third party, for which the officer paid nothing? Could the officer then turn around and sell a $\frac{7}{32}$ to X Company for \$32,500, and to the president of X Company a $\frac{4}{32}$ for \$18,571.40, leaving a valuable $\frac{3}{32}$ interest in himself? What if it should develop some 16 years later, as it has in this case, that neither officer nor the X Company nor its president had ever placed these conveyances of record when the universal practice in the oil business is to record them immediately? Would not the prompt answer of the layman be: "No man can serve two masters," giving his reason for his answer in the rest of the quotation, "for either he will hate the one and love the other; or else he will hold to the one and despise the other." Is that not what the Supreme Court of Texas said in effect in the case of *Nabours v. McCord* (*supra*), and also what Justice Cardoza so well expressed in *Wendt v. Fischer*, (*supra*)?

(b) Inasmuch as four issues were presented by the record and raised in appellants' Main Brief, Reply Brief and Motion for Rehearing, each one being fundamental, raising the question whether the September 28, 1925 contract was void ab initio, with an affirmative answer to one of them being sufficient to reverse the decision of the District Court, was it not palpable error for the Circuit Court not to have answered each one of them and to have discussed each one of them in its decision?

As to the question whether the September 28, 1925 contract is void because it delegates the managing

powers of the Pratt-Hewit Corp. to the directors of the Houston Oil Company, or because it violates the Texas usury statutes, or because it violates the Texas monopoly and anti-trust statutes, the answer to those questions appear in the face of the contract itself which is of record in the case. Consequently, these last three questions, at least, challenge the jurisdiction of the District Court and also the jurisdiction of the Circuit Court to enter a dismissal of plaintiffs' cause of action because there was no fraud or because of any other reason before passing upon those jurisdictional questions. Lack of jurisdiction is a question which every court should consider whenever and however it is raised.

"Lack of jurisdiction . . . is a question the court should consider whenever and however raised even if the parties forbear to raise it, or consent that the case may be heard upon its merits." In *Re Ettinger* 76 F. (2d) 741 (C. C. A. 2d).

"Even the Supreme Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage. (*Louisville & Nashville Ry. Co. v. Mottly*, 1908, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126.) Such a lack of jurisdiction can never be waived by the parties or such jurisdiction conferred on a court by consent of the parties. Citing in footnote—*U. S. v. Griffin* (1937) 58 S. Ct. 601; *City of Stuart v. Green* (C. C. A. 5th, 1937) 91 D. (2d) 603, certiorari denied, 58th Sch. 146; *Levering & Garrighes Co. v. Morris* (C. C. A. (2d) 1932), 61 F. (2d) 115, aff'd 289 U. S. 102." *Moore's Fed. Prac.* Vol. 1, p. 662.

"Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist. In fact, it must, of its own motion always consider the question of its jurisdiction over any matter brought before it, although not raised by the parties, since it is bound to take notice of the limits of its jurisdiction." 14 Am. Jur. p. 368.

" even though the action was improperly brought and should and will be eventually dismissed, nevertheless, the court will retain jurisdiction long enough to adjudicate issues raised by interventions, when necessary to do justice." Moore's Fed. Prac. Vol. 2, p. 2377.

(c) In that the four questions, *one*, whether Pratt placed himself in a position where self-interest conflicted with duty, *two*, whether the September 28, 1925 contract unlawfully delegated the managing power of the Pratt-Hewit Corp. to the directors of the Houston Oil Co., *three*, whether said contract violated the Texas usury statutes, and *four*, whether said contract violated the Texas monopoly and anti-trust statutes, although presented but not answered or discussed, it is probable that the decision of the Circuit Court would be *res judicata* as to each and everyone of these questions and thereby would cut off parties' right to relitigate them in a new action.

If such is the result, then the procedure whereby the petitioners have lost such right of action is directly in violation of the settled judicial procedure that meets the requirement of the due process clause

of the Fifth and 14th Amendments to the U. S. Constitution.

Petitioners are not unmindful of the volume of opinions which are being turned out each year in the courts of all jurisdictions which necessitate that judges be given the widest latitude possible in the exercise of their discretion as to when an opinion should or should not be given, and just what such opinion should or should not contain, nevertheless, American Jurisprudence, being largely founded upon precedence, there are limits to the exercise of this discretion, that is, cases may arise where to fail to write opinions and discuss questions presented, might constitute a denial of judicial procedure to litigants.

In the instant case, there is involved a basic question pertaining to the relationship of a fiduciary to his beneficiary.

The decision, if the material facts were set forth, would show that the Circuit Court overruled a principle of law pertaining to fiduciaries and their beneficiaries which has been obtained in all courts. Where courts overrule long established principles of law enforced in all courts, it does not lie within the discretion of any court not to state the controlling facts and the reasons for setting aside such long established principles of law.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed

to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10199, styled *Wert T. Reed, et al, Appellants, v. Houston Oil Company, of Texas, et al, Appellees*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals for the Fifth Circuit be reversed by this Court and for such further relief as to this Court may seem proper.

Dated this day of March, 1943.

ARTHUR H. BARTELT,
Attorney for Petitioners
Austin, Texas

W. B. RUBIN
Attorney for Petitioners
Milwaukee, Wisconsin

IN THE
Supreme Court Of The United States

October Term, 1942

No. _____

WERT T. REED AND F. F. DOLLERT,
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL,
Respondents

BRIEF

**IN SUPPORT OF APPELLANTS' APPLICATION
FOR PETITION OF CERTIORARI**

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is contained on pages 1041 and 1042 of the Transcript of Record, and is reported in Volume 142 F. (2d) 748.

II.

JURISDICTION

The date of the judgment of the Circuit Court of Appeals is the 8th day of January, 1943. (Tr. R. 1041). Petition for rehearing was made and was denied on February 17, 1943. (Tr. R. 1082).

This Court has jurisdiction of 28 U. S. C. Section 347 (Jud. Code, Section 240, amended, and also by virtue of Rule 38, 5(b) of the Revised Rules of this Honorable Court.

III.

STATEMENT OF THE CASE

The statement of the case is to be found under heading "I" in the petition. In the interest of brevity it is not repeated in the supporting brief.

Under heading "IV," "Reasons Relied on for the Allowance of the Writ," authorities are quoted under each question and points raised are discussed. This, therefore, will be, in fact, more or less of a supplemental brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in sus-

taining the judgment of the District Court in its findings that there "was no fraud."

2. The Circuit Court of Appeals erred in sustaining the judgment of the District Court in that, assuming for argument sake, that there "was no fraud," which petitioners emphatically deny, such finding does not determine the issues made in its case by the pleadings, record, evidence and exhibits—thus leaving the case wholly undecided.

3. The Circuit Court of Appeals erred in failing to pass on the question whether Thomas H. Pratt, who represented the Pratt-Hewit Corp., under the undisputed evidence, had placed himself in a position where self-interest conflicted with duty.

4. The Circuit Court of Appeals erred in failing to pass on the question whether the September 28, 1925 contract unlawfully delegated to the directors and officials of the Houston Oil Co. the power, authority, and discretion vested in the directors and officials of the Pratt-Hewit Corp. under its charter, the statutes of Texas and Delaware, and the Texas Supreme Court decisions applicable to said question.

5. The Circuit Court of Appeals erred in failing to pass upon the question whether the September 28, 1925 contract violated the Texas Usury statutes as interpreted by the Supreme Court of Texas.

6. The Circuit Court of Appeals erred in failing to pass on the question whether the September 28,

1925 contract violated the Texas Monopoly and Anti-Trust statutes as interpreted by the Supreme Court of Texas.

7. The Circuit Court of Appeals erred in making it appear by the decision which it filed that there was only one determinative issue in the case, namely, that a fraud had or had not been committed, an issue of fact which the District Court had answered in the negative, and which was, therefore, conclusive upon the Circuit Court of Appeals when, as a matter of fact, there was no dispute as to the evidence and the issues in the case were questions of law which were not mentioned or discussed in the opinion of the Circuit Court of Appeals.

V.

Summary of Argument as Found in IV., Reasons Relied on for the Allowance of the Writ and in Supporting Brief.

The Circuit Court of Appeals, by its affirming the decision of the District Court, which was "there is no fraud," says that there is only one decisive issue in the case and that is an issue of fact whether or not the evidence disclosed fraud, which the District Court answered in the negative and which the Circuit Court of Appeals says is fully sustained by the evidence.

The evidence primarily consists of Exhibits 9, 10, 10A, 11, 12, 13 and 37, all contracts or assignments

or leases made and executed by the Houston Oil Co., Pratt and Rooke and further consists of the account books of the Houston Oil Co., all of which cannot be and are not disputed.

Petitioners contend:

(a) that the acts of Pratt and the Houston Oil Co., as set out in the records listed in the foregoing paragraph, cannot be disassociated from fraud, that fraud is not determinative of the question as to whether the September 28, 1925 contract should be cancelled, and that therefore the decisive issues presented by the records of this case *have not yet been passed upon by either the District Court or the Circuit Court of Appeals.*

(b) that the undisputed evidence and records conclusively show

First, that the undisputed evidence and records show that Pratt placed himself in a position where self interest conflicted with duty.

Second, that on the face of the September 28, 1925 contract it appears that that instrument unlawfully delegates the right and power and duty vested with the directors of the Pratt-Hewit Corp. by virtue of its charter and the statutes of Texas and Delaware, with the directors of the Houston Oil Co.

Third, the September 28, 1925 contract, on its face, shows that it attempts to legalize that which the

Usury Statutes of Texas forbid as interpreted by the Supreme Court of Texas.

Fourth, that the September 28, 1925 contract, on its face, shows that it attempts to legalize that which the Monopoly and Anti-trust laws of Texas forbid, as interpreted by the Supreme Court of Texas.

VI.

ADDITIONAL ARGUMENT

A Contract Growing Out of or Connected with a Prior Illegal Contract—the Illegality of the Latter Enters into the New Contract and Renders it Illegal.

The September 28, 1925 contract grew out of all the personal loans extended to Pratt by the Houston Oil Co. and out of the exhibits 9 to 13, inclusive, and the other overt acts occurring when the September 28, 1925 contract was entered into, therefore, the illegality of the contracts made between Pratt and the Houston Oil Co. entered into the making of the September 28, 1925 contract and made the latter also illegal and void. Fraud can breed nothing but fraud.

“Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new and render it illegal, and the rule has been broadly stated that if the connection between the original illegal contract can be traced and if the latter is connected with and grows out

of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of recovery. 13 C. J. p. 509, sec. 460; *Armstrong v. Toler*, 11 Wheat, 258, 6 L. Ed. 468; *Tomkins v. Seattle Cons. & Dry Dock Co.* 96 Wash. 511, 165 p. 384." *Horbach v. Coyle*, 2 F. (2d) 707 (C. C. A. 8).

The foregoing "*Horbach v. Coyle*, supra," is quoted in the case of *Oldham v. Briley*, 118 S. W. (2d) 797, 809. (Tex. Civ. Appeals)

Quoting from the case of "*Shelton v. Marshall*," 16 Tex. 344, 363, the Court, in the *Oldham v. Briley* case, said:

"It is well settled that when an original contract is illegal, any subsequent contract, which carries it into effect, is also illegal."

"Where a contract grows immediately out of, and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract and render it illegal: So every new agreement in furtherance of, or for the purpose of carrying into effect, any of the unexecuted provisions of a previous illegal agreement is likewise illegal and void, and is a contract the performance of which depends on performance of a prior invalid contract." 17 C. J. S. 672.

(The above is virtually the same as is found in 13 C. J. S. 509, sec. 460 which is quoted in *Amarillo Oil Co. v. Ranch Creek Oil & Gas Co.* (Tex. Civ. App.) 271 S. W. 145, 154).

"The rule is that, where the contract grows out of and is connected with an illegal or immoral act, a court of equity, will not enforce it, and if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a mere contract, it is equally tainted by it. *Seelligson v. Lewis*, 65 Tex. 215, 57 Amer. Rep. 593; *Wegner Bros. v. Biernig & Co.* 65 Tex. 506; *Prudential Life Ins. Co. v. Pearson*, 188 S. W. 513." *Dodd v. Rawleigh Co.*, 203 S. W. 131. (Tex. Civ. App.)

One Void Consideration Makes Entire Contract Void.

"The illegal and legal considerations (if there be any legal ones) are inextricably mingled, and the papers (or other facts) do not furnish means whereby the unlawful considerations may be exclusively apportioned to the improper obligations so as to leave a valid obligation, complete in itself, supported by an independent valid consideration (if any there be). This portion of paragraph 4, its results, is within the general rule:

'That a promise made upon several considerations, one of which is unlawful, no matter *whether the illegality be at common law or by statute, is void.*' *Edwards County Jennings*, 89 Tex. 618, 35 S. W. 1053, 1054, and authorities cited; *Wegner Bros. v. Biernig*, 65 Tex. 506, Id. 76 Tex. 506, 13 S. W. 537; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418." *Raleigh Co. v. Land*, 279 S. W. 810, 813 (Tex. Com. App.).

"If any part of the consideration in a contract

is illegal, if not severable, the whole consideration is void. It matters not whether it is illegal because it consists in some act prohibited by statute or condemned by the common law." *Prudential Life Ins. Co. v. Pearson*, 188 S. W. 513, 515, (Tex. Civ. App.)

The September 28, 1925 Contract, in that it Provides for that which Various Texas Statutes Prohibit, Cannot be Ratified by Either the Directors or Stockholders, and Courts are Powerless to Breathe Life and Validity into It.

"It is the established principle that confirmation may make good a voidable or defeasible estate, *but cannot operate upon or aid an estate which is void in law.* 1 Devlin on Real Estate (3d Ed.) Sec. 18, p. 30; 14 Tex. Jur. Sec. 23, p. 776; *Breitling v. Chester*, 88 Tex. 586, 32 S. W. 527, 529; *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28, 40 S. W. 628, 629, 1 Warvelle on Vendor's, sec. 388, p. 402." *Clark v. Humble Oil & Refg. Co.* 57 S. W. (2d) 597, 602, reversed on other grounds, 87 S. W. (2d) 471.

"If this contract is illegal and against public policy, there is no power which can breathe life or validity into it, and the ratification attempted to be made by the City Commission would be void. 19 R. C. L. sec. 196; 13 C. J. 506." *Meyers v. Walker*, 276 S. W. 305, 307. (Tex. Civ. App.)

"The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as 'there can be no civil right where there can be no remedy, and there can be no legal rem-

edy for that which is itself illegal.' Bank of U. S. v. Owens, 2 Pet. 527, 539, it is clear that contracts in direct violation of statutes expressly forbidding their execution, cannot be enforced.

"The question is not one involving want of authority to contract on account of irregularity of organization or lack of affirmative grant of power in the charter of a corporation, but a question of absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.'

" 'The rule of law,' said Parker, C. J. in Russell v. De Grand, 15 Mass. 35, 39, 'is of universal operation, that one shall not by and of a court of justice, obtain the fruits of an unlawful bargain.' " Gibbs v. Consolidated Gas Co., 130 U. S. 396, 419, 32 L. Ed. 979, 9 S. Ct. 553.

See also Hood v. Campbell (Tex. Civ. App.) 2 S. W. (2d) 925, reversed on other grounds, 35 S. W. (2d) 98; Slaughter Cattle Co. v. Potter County, 235 S. W. 295, 316; California State Life Ins. Co. v. Kring (Tex. Civ. App.) 208 S. W. 372.

"When the performance of a contract otherwise legal will involve the violation of the terms of a statute or of positive rule of law, *it is not enforceable and cannot be ratified* nor its terms made binding by ratification, waiver, or otherwise. Rue v. Missouri Pac. Ry. Co., 8 S. W. 533, 74 Tex. 474, 15 Am. St. Rep. 852; Raywood Rice C. & M. Co. v. Erp, 146 S. W. 155, 105 Tex. 161; Chimene v. Pennington, 79 S. W. 63, 34 Tex. Civ. App. 424." Ferguson v. Mounts, 281 S. W. 616, 621.

The Undivided $\frac{3}{32}$ Interest in the Rooke 200 Acre Lease which Pratt Received is a Continuing Bribe and Fraud.

The 200 acre lease of A. D. Rooke became productive, according to Rooke's testimony, on September 7, 1925. (Tr. R. 836). It continued to be productive during the remainder of Pratt's life and is still highly productive and the check which used to go to Pratt now goes to his heirs each month. (Tr. R. 780). This continuous production coming from this $\frac{3}{32}$ undivided interest originally contemplated and did occasion the daily cooperation between the Houston Oil Co. and Pratt, and between the former and Pratt's heirs since his death. The Houston Oil Co. drilled a large number of additional wells, operated the same, credited Pratt's account each day with the income from the $\frac{3}{32}$ interest, and its payment of a monthly check for the royalty and the acceptance of this by Pratt and after his death by his heirs presents a series of acts committed by the parties day by day "contemplated bringing to pass continuous results that will not continue without the continuous cooperation of the conspirators to keep it up." Either party could at any time have refused to go on with the unlawful agreement. At the same time that this was going on and until his death Pratt was the dominant stockholder and the official in complete charge of the corporation's affairs in Texas. He, therefore, owed a duty to the Pratt-Hewit Corporation, a fiduciary one, one that he contumaciously violated each day and was aided and abetted in this by the Houston Oil

Co. by its sending him its monthly check coming from the alleged royalty, totalling \$125,000 or more. This presented a situation in which Pratt's private business interest with the Houston Oil Co. squarely conflicted with the unqualified duties he owed to his corporation when representing it in making the September 28, 1925 contract with the Houston Oil Co. Pratt continued in these impossible contradictory dual interests and this impossible relationship from 1925 until his death on September 3, 1938. All the dealings that took place between Houston Oil Co. and Pratt from the executing of the September 28, 1925 contract (this being the first) and which are still being carried on with the Pratt heirs, M. A. Shaw, president and director, and George P. Pratt as director of the Pratt Hewit Corporation, are illegal and void—at their inception. *Wile et al v. Burns*, 265 N. Y. 461, (supra) and other cases cited herein.

The two drilling contracts, Exhibits 10 and 10A, were amended, modified and enlarged by a written contract dated June 8, 1933, between the Houston Oil Co., Pratt and Rooke. (Tr. R. 973-977)

Justice Holmes, in the case of *United States v. Kissel*, 218 U. S. 607, 608, 31 S. Ct. 124, 126, said:

"The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the continuando may be disregarded and a plea is proper to show that the statute of limitation has run. Subsequent acts in pursu-

ance of the agreement may renew the conspiracy, or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplated future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

“The agreement, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, *but it does not exhaust it*. It is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irving*, 98 U. S. 450. *But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and when there is such continuous cooperation, it is a perversion of natural thought and of language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.*”

“A continuing offense is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an intermittent force, however long a time it may occur. *United States v. Midstates Horticultural Co.* Pa. 59 S. Ct. 412, 414, 306 U. S. 161, 83 L. Ed. 563.” 9 Words & Phrases, Per. Ed. Cum. Pkt. 37.

“The fourth cross-assignment, relating to the late entry of the Sinclair Refining Co. into the state, is without merit and is overruled. This

company is sued as a corporation with the other defendants in error, and, having once entered the conspiracy, *however late*, becomes in law a party to every act previously or subsequently done by any of the others in pursuance of it. 12 C. J. 612, sec. 181." *State v. Standard Oil Co.* (Tex. Sup. Ct.), 107 S. W. 550, 560.

In the case of *Waters-Pierce Oil Co. v. Texas*, 53 L. Ed. 417, 429, 212 U. S. 86, 29 S. Ct. 220, 225: Appellant had been found guilty of violating the Texas Anti-Trust Laws and thereby forfeited its right to do business in Texas. It was charged that Waters-Pierce Oil Co. had entered into a conspiracy with the Standard Oil Company of New Jersey, et al, to violate the Texas Anti-Trust Law.

"It is contended in the case that the acts in this case were given retroactive effect, in violation of the Federal Constitution, Art. I, Sec. 10. This argument is predicated largely upon the contention that the conviction in the case was because of the old agreement of the former Waters-Pierce Oil Co. made long before the passage of the present statute *at a time when it was legal*, and before the creation of the defendant company. But in view of the facts found in the state court, to which we have already referred, there was ground for conviction, not because of the making of the old agreement for the division of the territory and the suppression of competition while the old company was in existence, *but because the new company was found to have carried out the old agreement and made itself a party thereto, and, by continuing the arrangement after the pas-*

sage of the law, had brought itself within its terms."

See also, *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. Ed. 1007, 17 S. Ct. Rep. 540.

From the foregoing authorities, it must be held that the Pratt heirs, one of them being the wife of M. A. Shaw, by accepting the income from the 3/32 Pratt interest in the A. D. Rooke lease, joined the conspiracy with the same effect as though they were original parties to it.

A few months after the death of Pratt, which was September 3, 1938, M. A. Shaw, the husband of Laura J. Shaw, a daughter of Pratt, was elected president by the directors of the two Pratt-Hewit corporations, and, as has already been shown by Fairbrother's testimony, the income from the 3/32 interest in the Rooke 200 acre lease is being paid by the Houston Oil Co. to Pratt's two daughters, Laura J. Shaw and Frances R. Webster, and his son, George P. Pratt and to his wife, Grace D. Pratt. The only party or company with which the two Pratt-Hewit corporations had any dealings was and still is the Houston Oil Co. M. A. Shaw and also George P. Pratt as directors, therefore, disqualified to act in behalf of the Pratt-Hewit Corporation and its stockholders in its dealings with the Houston Oil Co. Shaw from year to year is elected as president of both the Pratt-Hewit corporations. The directors of the Pratt-Hewit Corporation and

their relatives own about 2/3 of the stock of the two Pratt-Hewit corporations.

The District Court in its Finding of Fact No. 18, said:

"No. 18. The fraud, if any was committed, was consummated in 1925. By reason of the fact that the stock had already been set up on the books in the name of Pratt and Hewit and the fact that the contract, sought to be cancelled, and the leases executed pursuant thereto assigning to the defendant Houston Oil Company of Texas, a one-half interest were executed in November, 1925, the plaintiff's and intervenor's contention that the fraud is a continuing fraud because of the amendment of the drilling contract of 1932 and 1933 is without merit. The fraud had already been consummated, and the fact that royalties were subsequently paid thereunder would not, in my judgment, operate to continue the fraud so as to entitle this plaintiff Wert T. Reed to bring action." (Tr. R. 517).

The Circuit Court affirmed this finding of the District Court when it said:

"The findings and conclusions of the District Court are free from error and the judgment appealed from is affirmed."

Appellants contended through the trial of the case and in their briefs filed with the United States Circuit Court of Appeals, that the 3/32 interest which Pratt received constituted a continuing

fraud, and also that Shaw was disqualified from representing the Pratt-Hewit Corporation in its dealings with the Houston Oil Co.

This attempt of a fiduciary to serve conflicting dual interests has been going on for 18 years and is still insisted upon by the directors continuing to elect M. A. Shaw as president of the two corporations. It has met with the full approval of the District Court and is affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. **This flaunting of a law so universally approved by the courts in all jurisdictions, one which lies at the basis of the relationship between a fiduciary and his cestui, will continue as long as oil and gas is produced from the oil and gas leases alleged to be held jointly by the Houston Oil Co. and the Pratt-Hewit Corporation unless this Court takes jurisdiction.**

The Finding of the District Court and its Affirmation by the Circuit Court that there Was No Fraud is Wholly Unsupported.

Enough has already been said to show very clearly the error of the above finding. However, there are a few other striking features of Pratt's private dealings with the Houston Oil Co.

Suppose that on June 6, 1925 Pratt had not been the manager or an official or a director of the Pratt-Hewit Corp. and had asked the president of the Houston Oil Co. to have the company loan him \$5,000, wouldn't he have been promptly told that the Houston Oil Co. is not in the business of loan-

ing money, and further that its charter would not permit it to make loans to anyone? Even if Pratt had been a special friend of the president or some other official of the company the answer would not have been otherwise.

The Houston Oil Co. offered no evidence showing that any other individuals were accommodated by it with loans, nor did it attempt to explain just why Pratt was the only privileged character. There is no escape from the conclusion that Pratt was given these loans because he was the resident manager, the dominant official and stockholder of the Pratt-Hewitt Corp. which owned 23,000 acres of oil and gas leases with two big producing gas wells which the Houston Oil Co. wanted and that it was only through Pratt that it could expect to be given a contract by the Pratt-Hewitt Corp. such as the September 28, 1925 contract is.

An examination as to just what each one of the triumvirate got out of the A. D. Rooke lease will disclose some interesting things.

Pratt didn't put out a single dollar but received an undivided $\frac{1}{2}$ interest in the Rooke 200 acre lease, and was subrogated to Rooke's rights in the two drilling contracts, exhibits 10 and 10A, which Rooke had made with the Houston Oil Co. Furthermore, Pratt sold a $\frac{7}{32}$ interest in the lease to the Houston Oil Co. for \$32,500 and to Buckner, president of the Houston Oil Co. a $\frac{4}{32}$ for \$18,571.40 and re-

tained in himself a $\frac{3}{32}$ out of which he realized at least \$125,000 before his death.

There is nothing in the record, whatsoever, to show just why A. D. Rooke should make Pratt a present of this $\frac{1}{2}$ interest.

A. D. Rooke really represented the Rooke family, as he testified (Tr. R. 840-841). It was the Rooke family that owned this land on which the lease was taken. The lease was given A. D. Rooke by his father and mother.

A. D. Rooke didn't pay out a single dollar and didn't take any gamble.

The Houston Oil Co., although it owned no interest in the lease whatsoever, by the two drilling contracts agreed to furnish all the necessary money with which to drill the exploratory wells, equip them with casing and other equipment, and if the wells were producers, then it had the privilege of operating the wells until it repaid itself for drilling and equipping them, and as soon as that was done, it was to move off its drilling equipment; if the hole was dry then the Houston Oil Co. alone was to lose all the money spent in drilling the dry hole. The contract specifically provided that Rooke and his assignee were not to be liable for any money spent by the Houston Oil Co. in drilling the dry holes.

There was another very unusual feature in the arrangement as to this 200 acre lease between the

Houston Oil Co and Rooke and Pratt. Ordinarily, all the land owner gets out of drilling a well on his land is a $\frac{1}{8}$ royalty, but in this unusual arrangement between these three parties the Rooke family were permitted to retain a $\frac{1}{2}$ interest in the leasehold, so that their interest in the oil and gas lease was $\frac{1}{8}$ plus $\frac{7}{16}$, or a total of $\frac{9}{16}$. This means that out of every 16 bbls. of oil produced on the lease 9 bbls. went to the Rooke family. Pratt himself paid nothing for his $\frac{1}{2}$ interest. Rooke was paid for that $\frac{1}{2}$ interest he sold and conveyed to Pratt, but was not paid by Pratt but by the Houston Oil Co. who permitted the Rooke family to retain a $\frac{1}{2}$ leasehold interest. It is plain that the Houston Oil Co. paid Rooke for what Rooke gave to Pratt.

The first well on the 200 acre lease was completed in September, 1925. At that time the Houston Oil Co. had no interest in the lease and did not get any interest until January 1, 1926 when the Houston Oil Co. bought $\frac{11}{32}$ interest for which it paid \$51,571.40 (including Buckner's interest).

Attention is again called to the fact that under the contract the Houston Oil Co. was obliged to stand the loss of the cost of every dry hole that was drilled. Just what was there in this deal between the Houston Oil Co., Rooke and Pratt, financially, as to the 200 acre Rooke lease? In the two drilling contracts the Houston Oil Co. did reserve the right, at its election, to buy the oil and gas produced, at market price. But that is far from a satisfactory explanation as to why the Houston Oil Co. entered into this

singular oil venture—a game which they thoroughly understood and could not be easily victimized in. No explanation has been offered by the Houston Oil Co.

Oil companies do not pay bonuses and take the gamble of paying for the cost of drilling any and all the dry holes on the lease for the privilege of buying oil and gas at current market prices. Nor do oil companies contract to drill test wells on a landowner's tract of land and agree to pay all cost of drilling and lose such cost of the well if it proves to be a dry hole and if productive to be merely repaid to the extent of the amount expended in drilling and equipping the new well without first having executed to themselves an oil and gas lease from the landowner before they undertake anything of that kind.

The Houston Oil Co. acquired no interest whatsoever in the Rooke 200 acre lease until it purchased a $7/32$ interest from Pratt, and Buckner purchased his $4/32$ interest on January 1, 1926. Those interests represent the extent of the Houston Oil Co.'s ownership of the oil and gas underneath the Rooke 200 acre lease at this date. There is nothing in the record or even an attempt to explain such unheard of oil and gas lease contracts as were made between the Houston Oil Co., Pratt and Rooke.

Only one conclusion can be drawn from it all, namely, that the motivating cause of the fraudulent transaction, the impelling "impulse" of the conspiracy, was that the Houston Oil Co. was determined, regardless of all costs, or character of method em-

ployed, to get the September 28, 1925 contract, for it was through that contract that the Houston Oil Co. figured and did realize its profits that arise out of the fraudulent conspiracy. That was what Buckner meant when he testified:

“On page 36 (deposition) Mr. Buckner states that at the time the contract was made those were unusual times, competition was very keen down there, and an operating company would do a whole lot to get the gas; that, what it wanted was the gas in its line and not so much at 6 cents a foot.” (Tr. R. 833)

“On page 37 (deposition) Mr. Buckner states that he wanted the gas and ‘we wanted to smash our competitors,’ and he said that his competitor was O. R. Seagraves and his crowd, and the landowner knew it and didn’t fail to hold him up.” (Tr. R. 833)

“On page 58 (deposition) Mr. Buckner testifies that the competitive battle down there was just as serious as the battle on the German front today.” (Tr. R. 834)

Pratt contributed no money or property of his own to the illegal conspiracy. What he brought into it was not his to give, or to sell, that is, his official discretion which he did use to deliver to the Houston Oil Co. the September 28, 1925 contract. Being not his, he had no right to take from the Houston Oil Co. as his own the \$51,071.40, nor the income from the 3/32 interest in the 200 acre lease amounting to \$125,000 or more. Nor did the Houston Oil Co. have the right

to pay him said money, nor did it have the right to loan him the various sums of money which it did.

The Houston Oil Co. knew that Pratt represented the Pratt-Hewitt Corp.; knew of his complete control over that company and its directors; knew that Pratt was keeping all these transactions a secret from his corporation. It aided and abetted him in this secrecy by its failure to place of record these various Exhibits 10 to 12, inclusive. It became voluntarily a *particeps criminis* in the conspiracy to perpetrate the fraud upon the Pratt-Hewitt Corp. and its stockholders.

VII.

CONCLUSION

The facts in the case, consisting entirely of the written records made by Pratt, the Houston Oil Co. and Rooke, have not and cannot be disputed. These facts are of such character and are made under such circumstances that according to the decision of *Pepper v. Lytton* (Supra) that the burden of proof is upon the officer, for the latter in his

“dealings with a corporation are subjected to *rigorous scrutiny* and where any of their contracts or engagements with the corporation is challenged, *the burden is on the director* or stockholder, not only to prove the good faith of the transaction, but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.”

The Houston Oil Co. and the other defendants who hold interests through the Houston Oil Co. and Pratt have utterly failed to meet the requirements of a dominant stockholder as set out in the foregoing decision.

The failure of the Circuit Court of Appeals to apply to the facts in the case the following test and to pass upon the jurisdictional questions which appear upon the record—

First, whether Thomas H. Pratt placed himself in a position where self-interest conflicted with duty,

Second, whether the September contract, on its face, unlawfully delegated to the directors of the Houston Oil Co. the right to manage the affairs of the Pratt-Hewit Corp., vested in the directors of said corporation, by virtue of the charter of the Pratt-Hewit Corp., and the laws of Texas and of Delaware,

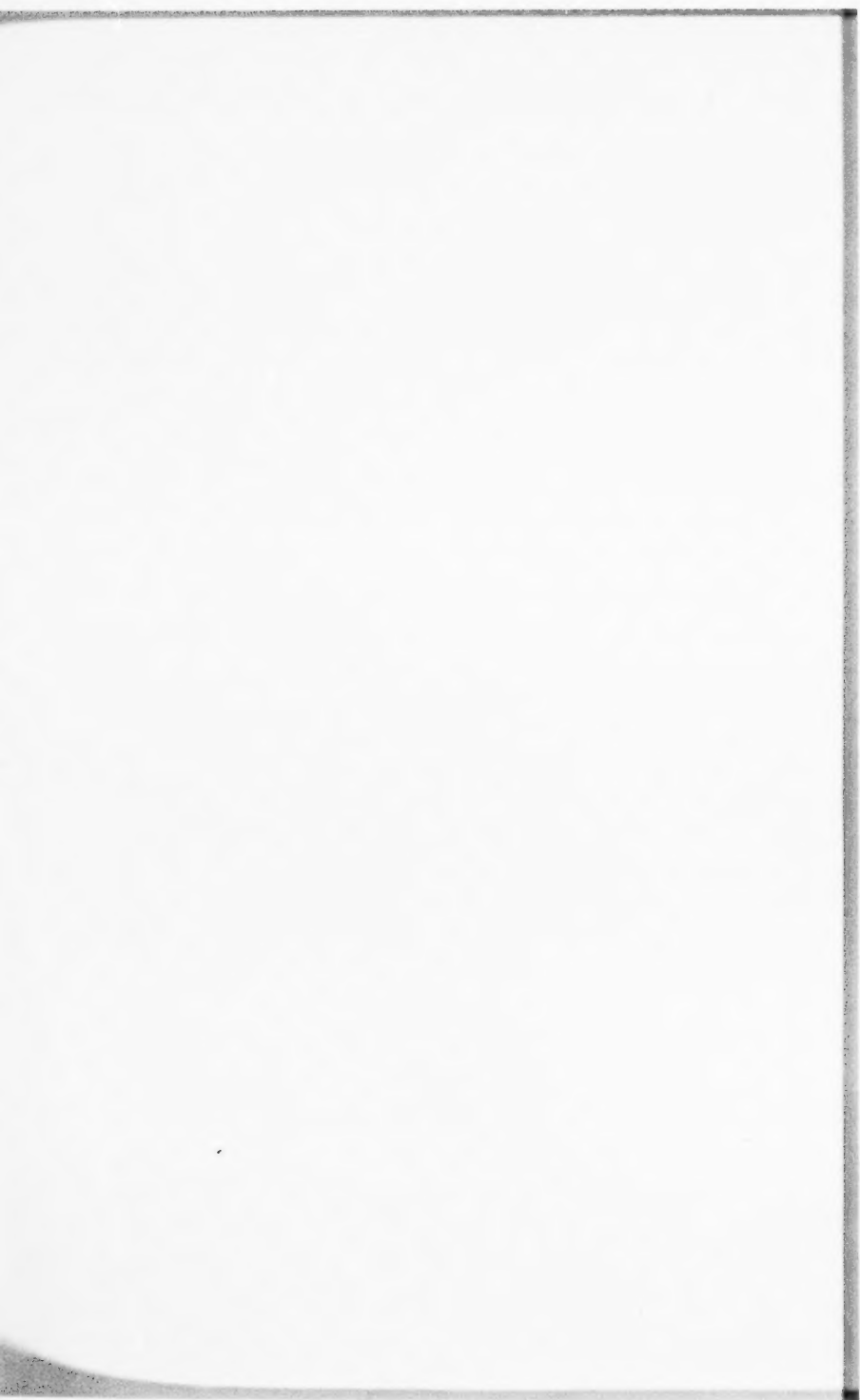
Third, whether the September contract, on its face, violated the Texas Usury Statutes and

Fourth, whether the September 28, 1925 contract violated the Monopoly and Anti-Trust Statutes, place the decision of the Circuit Court of Appeals in direct conflict with the local laws of Texas and the decision of its Supreme Court and is also in direct conflict with the decisions of this Court and of the Circuit Court of Appeals of other circuits.

WHEREFORE, petitioners respectfully submit that the writ of certiorari prayed for should be granted.

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT, *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

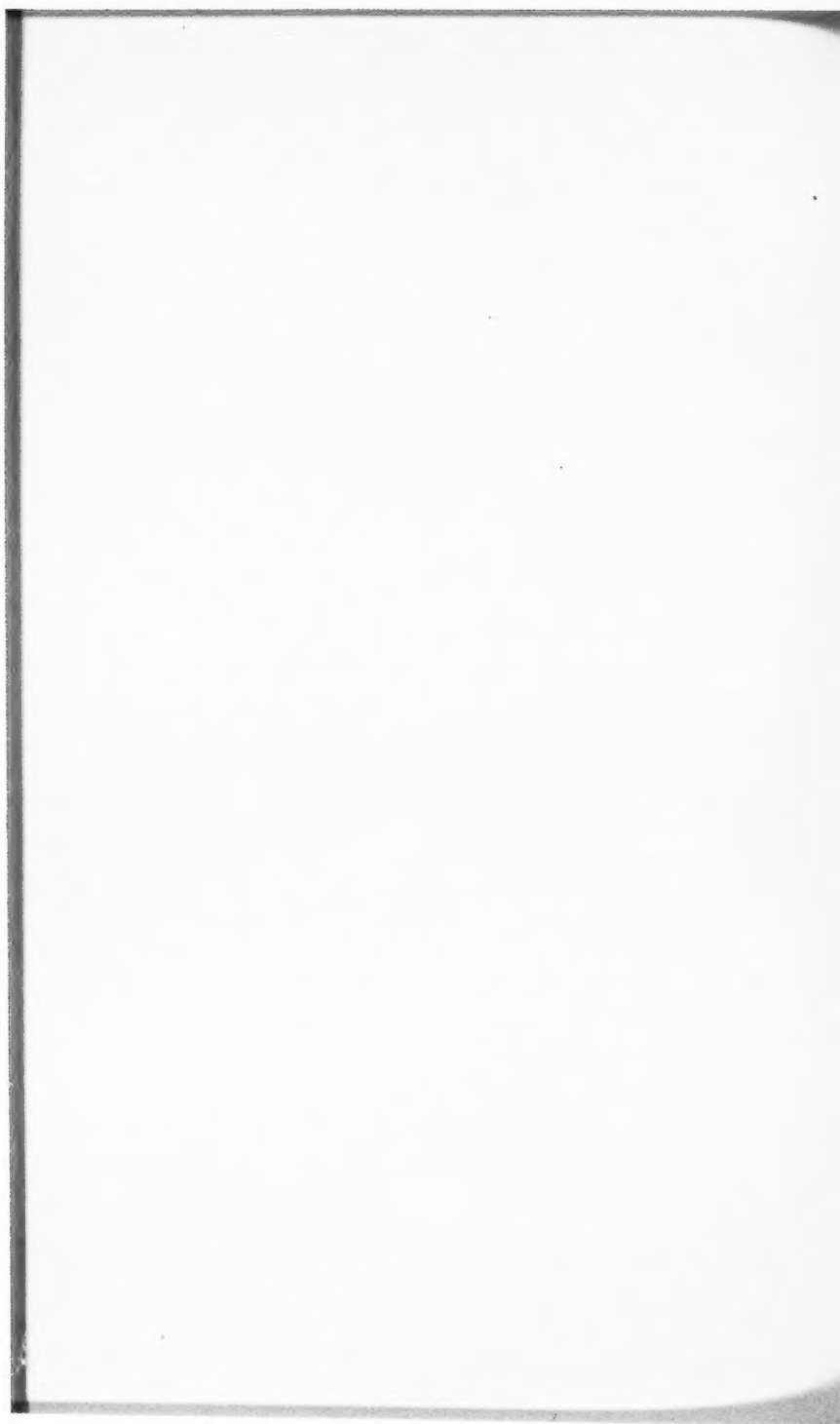
REPLY OF RESPONDENTS,

Houston Oil Company of Texas and Houston
Pipe Line Company to Petition for Writ of
Certiorari to the United States Circuit Court
of Appeals for the Fifth Circuit, and Brief in
Support Thereof

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IN THE
SUPREME COURT OF THE
UNITED STATES

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WERT T. REED AND F. F. DOLLERT, *Petitioners*,

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENTS,

**Houston Oil Company of Texas and Houston
Pipe Line Company to Petition for Writ of
Certiorari to the United States Circuit Court
of Appeals for the Fifth Circuit, and Brief in
Support Thereof**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Respondents, Houston Oil Company of Texas and Houston Pipe Line Company, respectfully contend and submit that the Writ of Certiorari herein prayed for, the granting of which rests entirely in the discretion of this Honorable Court, there being no Federal question involved, and jurisdiction in the Federal Courts depending solely on diversity of citizen-

ship between Petitioners and Respondents in this suit, should not be granted under the following facts for the following reasons:

Summary Statement of the Matters Involved

Petitioners, Wert T. Reed and F. F. Dollert, two out of some several hundred minority stockholders of Pratt-Hewit Oil Corporation, brought this suit in 1940 against these Respondents, Houston Oil Company of Texas and Houston Pipe Line Company, and others, to cancel a Joint Oil and Gas Operating Contract executed in 1925 by and between Pratt-Hewit Oil Corporation and Houston Oil Company whereby Houston Oil became the Operator with a fractional interest and Pratt-Hewit Oil was the Non-Operator with the remaining fractional interest in certain gas properties on which oil was also developed at a later date, on the alleged ground that Houston Oil fraudulently procured said contract by buying the official discretion of Thos. H. Pratt, Secretary of Pratt-Hewit Oil, by paying to him, individually, alleged excessive considerations in connection with two deals made with him in 1925, one involving the F. B. Rooke 200-acre lease, and the other the Clinton Heard 100-acre lease. Such Petitioners did not allege in their Bill of Complaint (Tr. of Rec. pp. 310 to 351), that said contract was procured through loans from Houston Oil to said Secretary, nor that said contract was void because same unlawfully attempted to delegate the powers and discretion vested in the Directors of Pratt-Hewit Oil to the Directors of Houston Oil, nor that said contract was void because of the usury statutes of Texas and the anti-trust and monopoly laws of Texas, as they later contended in the Circuit Court of Appeals and now contend in their Petition for Writ of Certiorari (Petition for Writ, pp. 2 to 24). These Respondents

in their answer pleaded (1) *res judicata* on the ground that the same cause of action, between the same parties, based upon alleged fraud in obtaining said contract, and also upon the allegation that the contract was in violation of public policy, the Texas usury statute, and the Texas anti-trust laws had been brought in a State Court in 1927 and had been disposed of by final judgment in 1937 in favor of these Respondents; (2) that Petitioners were estopped to deny such contract because in a final agreed judgment entered in 1938 in still another suit filed in 1933 in a State Court they had recognized such contract; (3) that their alleged cause of action in the present suit was barred by laches, stale demand and the Texas Two and Four Year Statutes of Limitation; and (4) that their allegations of fraud were untrue (R. pp. 351 to 379).

On the trial of the case it was developed that the loans made by Houston Oil Company of Texas to the Secretary of Pratt-Hewit Oil were made and used for the benefit of Pratt-Hewit Oil (R. p. 485); that the deals made by Houston Oil in connection with the Rooke lease and the Heard lease were not fraudulently made and the consideration paid by Houston Oil for an interest in the Rooke lease was not excessive and the contract sought to be canceled was not fraudulently procured by Houston Oil (R. pp. 840 to 843); that in a deposition in a case in the Federal Court in which Pratt-Hewit Oil was a party, the Secretary thereof testified in 1926 that he owned an undivided mineral interest in Refugio County, Texas (Rooke lease), and that he owned an interest in the Heard lease (R. pp. 846 to 859); that the very contract sought to be canceled and which had been recorded in the proper Deed Records in 1926 recited the Secretary's interest in the Heard lease, such ownership of interest being one of the two alleged bases of fraud (R. p. 885); that in 1935 Houston Oil Company recorded in the proper Deed Records an assignment showing every link in the

chain of title on the Rooke lease and the interest of the Secretary of Pratt-Hewit Oil, the other alleged basis of fraud, and that of Houston Oil Company therein (R. pp. 790 and 951); that in a State Court suit in which Pratt-Hewit Oil was a party Houston Oil, in 1936, filed under oath a pleading setting out the instruments through which the Secretary of Pratt-Hewit Oil and Houston Oil held interests in said Rooke lease (R. p. 944); that in 1937 in a State Court a final judgment was entered in a stockholders suit in which the Petitioner, Dollert, Pratt-Hewit Oil, Houston Oil, and others were parties, and which had been pending for ten years, adjudicating that the contract in question and sought to be set aside was not based upon fraud (R. pp. 223 and 358); and in a final agreed judgment entered in 1938 in still another State Court suit filed in 1933, in which Petitioners, Pratt-Hewit Oil, Houston Oil, and others, were parties, Petitioners recognized as valid the Operating Contract (R. pp. 359 and 476).

At the conclusion of the trial of the instant case the Trial Court held in its Findings of Fact and Conclusions of Law (R. pp. 507 to 520) that there was no fraud in connection with the procurement of the contract sought to be canceled, that the loans made to the Secretary of Pratt-Hewit Oil were used for that corporation's benefit, and that the alleged cause of action was barred by *res judicata*, and that such cause of action, if any, was barred by laches, stale demand, and the Texas Statutes of Limitation; and upon such Findings of Fact and Conclusions of Law the Trial Court entered its final judgment on the merits of the case that the Petitioners herein "take and recover nothing of and from" the Respondents herein (R. p. 504).

The United States Circuit Court of Appeals, Fifth Circuit, affirmed the judgment of the Trial Court, and in so doing held:

"It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the District Court are free from error, and the judgment appealed from is

Affirmed." (R. p. 1041 and REED v. HOUSTON OIL Co., 132 Fed. (2d) 748.)

REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED

First

Because there are concurrent findings of fact of the District Court and the Circuit Court of Appeals, which findings have not been shown to be plainly erroneous or unsupported by the evidence, but which are amply supported by the record in the case, since the Trial Court, after the waiving of a jury by the parties, and after hearing and considering the testimony and evidence, found the facts in favor of the defendants and against the plaintiffs, Petitioners herein, and the Appellate Court on reviewing the case held that "*the findings and conclusions of the District Court are free from error.*" (R. pp. 504, 507 and 1041; 132 Fed. (2d) 748.)

Second

Because neither a District Court nor the Circuit Court of Appeals in deciding this case have rendered decisions affecting in any way any Federal question, since none was involved. (R. pp. 504, 507 and 1041).

Third

Because the Circuit Court of Appeals in deciding this case has not rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, since in its opinion it recites "Many issues were presented and many defenses raised in the court below, but Appellees' real defense was that there was no fraud * * *. The *findings* and conclusions of the District Court are free from error * * * ", thus showing that, aside from conclusions of law which the Trial Court found against Petitioners and which the Appellate Court found free from error, on the merits the facts were against the Petitioners, thus making it unnecessary for the Appellate Court to cite a single decision of any court, State or Federal. (R. p. 1041).

Fourth

Because the Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable decisions, since the Circuit Court of Appeals' affirmation of the Trial Court's findings and its judgment can be amply supported by the findings of fact on the merits against Petitioners and on the findings of fact and of law on the defenses of res adjudicata, estoppel, laches, stale demand, and the Texas Two and Four Year Statutes of Limitation, and since there is not a single proposition of law announced in the opinion of the Circuit Court of Appeals in conflict with applicable local decisions on important questions of local law. (R. p. 1041).

Fifth

Because the Trial Court made no finding contrary

to local decisions on Texas usury, monopoly, and anti-trust laws, and because the Circuit Court of Appeals in affirming the Trial Court's findings and judgment did not, as a matter of fact, pronounce a single proposition of law in conflict with local decisions on such local laws, and because, as a matter of fact, such local laws are not applicable to the case and if they were, they were not pleaded in the instant case though they were later argued by Petitioners, and because such local laws were pleaded and relied upon in the former stockholders suit in the State Court where judgment was adverse to the contentions of the Petitioners and is binding herein as *res adjudicata*. (R. pp. 504, 507 and 1041).

Sixth

Because the Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, and has not so far sanctioned such a departure by a lower court, since no departure was made, as to call for an exercise of the Supreme Court's power of supervision, and because there are no special and important reasons stated by the Petitioners, nor in the record, why a Petition for Writ of Certiorari should be granted. (R. p. 1041).

Brief in Support of Reply

In our Reply we have called the Court's attention to the fact that there is no Federal question in this case. In the absence of such a question the Petitioners have no right to a direct appeal from the Circuit Court of Appeals for the Fifth Circuit to this Honorable Court. Federal jurisdiction was sought and had on the ground of diversity of citizenship only. Under the facts in the instant case Petitioners must

depend upon the discretion of this Court to secure its jurisdiction since they are not entitled to invoke the jurisdiction of this Court as a matter of right. Petitioners, therefore, seek to get before this Court under Sec. 240 of the JUDICIAL CODE, 28 U.S.C.A. 347, and SUPREME COURT RULE 38.

Petitioners in their Bill of Complaint alleged that Houston Oil acquired the contract sought to be cancelled by purchasing the official discretion of the Secretary of Pratt-Hewit Oil by fraudulently making a deal with him on the Clinton Heard lease prior to said contract and by fraudulently making a deal with him on the F. B. Rooke lease subsequent to said contract. The Trial Court held that there was no fraud in these matters and in obtaining such contract, thereby in effect holding that the Heard lease deal had nothing to do with obtaining the contract, and the contract itself disclosed that the Heard lease deal had been made and that the Rooke lease deal had nothing to do with obtaining said contract. Petitioners in their Complaint alleged nothing about loans made by Houston Oil to the Secretary of Pratt-Hewit Oil, but on their appeal claimed that this was fraud in securing said contract. The evidence was that the loan was made to secure pipe for Pratt-Hewit Oil and that it and not the Secretary reaped the benefit. The Trial Court held that there was no fraud in this connection and in effect had nothing to do with obtaining said contract. Petitioners in their Complaint alleged nothing about the contract being in violation of the Texas Statutes and laws on anti-trust, monopoly and usury, but on their appeal claimed that the contract was void for such alleged violations. We submit that if there be in the contract in question a violation of the anti-trust and monopoly laws, which these Respondents deny, the Attorney General of Texas, and not the Petitioners herein, would be the proper party to raise such issues.

We further submit that, when two corporations make a

Joint Operating Contract on certain mineral lands, this does not create a monopoly, and further that when one is designated the Operator and the other the Non-Operator thereunder that this does not create a trust and that merely because the Operator has the discretion as to operations of the leases that such power does not give such Operator the control of the Non-Operator's corporate affairs nor is it a delegation of corporate affairs by the Non-Operator to the Operator, since each corporation still administers its own internal and corporate affairs, the Operator corporation merely paying to the Non-Operator corporation its portion of the profits under such contract and it in turn making its own use and distribution of such profits and being free to operate any other leases as it sees fit. In Texas a corporation may "sell, mortgage or otherwise convey" any or all of its property. R. S. 1925, ART. 1320, SUBD. 4. It may likewise lease all or a part of its properties without abandoning its object or terminating its corporate powers. *STARKE V. GUFFEY PETROLEUM*, 98 Tex. 542.

We also submit that such contract was not usurious. If it were, the injured party would have two years to bring suit for recovery of double the interest paid and nothing more. Under its terms the Operator advanced large sums to Non-Operator to pay off its debts with interest at six per cent per annum, whereas, the maximum interest rate under the Texas law was ten per cent per annum, and advanced large sums to develop the properties, one-half to be borne by each party, and donated its skill and experience and ran the risk of not only not getting any interest on its money, but of losing all the principal if sufficient production was not had, and as a matter of fact the Operator spent hundreds of thousands of dollars over a period of several years before it ever made a dollar profit and then only because of a fortunate discovery of oil in addition to the previous discovery of gas, all of which then made a solvent corporation of Pratt-Hewitt Oil, whereas,

it had been an insolvent corporation at the time of the making of such contract. TEXAS REVISED CIVIL STATUTES OF 1925, Articles 5069, 5071 and 5073. Usury cannot be predicated upon a transaction whereby repayment of any amount under the contract rests upon a contingency of production of minerals, or upon a joint venture in which the parties pool their resources with the expectation of making a profit. PANSY OIL CO. v. FEDERAL OIL CO. (T.C.A.), 91 S.W. (2d) 453; BURTON v. STEYNER (T.C.A.), 182 S.W. 394.

The Trial Court has held that on the facts and on the merits Petitioners had no cause of action, but that nevertheless in the former stockholders suit in the State Court all issues of fraud, anti-trust, monopoly and usury had been decided against their contention and in favor of Houston Oil (R. p. 513), and such was res adjudicata and, furthermore, that any such cause of action, if any, was barred by laches, stale demand and the Texas Two and Four Year Statutes of Limitation, since one of the alleged acts of fraud, the Heard lease deal, was disclosed in the said contract of 1925 which went of record shortly after its making about fifteen years before the filing of the present suit, and since the other alleged act of fraud, the Rooke lease deal, was disclosed in a deposition in a Federal Court suit in 1926 in which Pratt-Hewit Oil was a party and such deal was spread of record in 1935 on the Deed Records, and in 1936 was fully disclosed in another State Court suit (R. pp. 514-519). Texas Two and Four Year Statutes of Limitation, TEXAS REVISED CIVIL STATUTES OF 1925, Arts. 1926, 1927 and 1929; EVANS v. SOUTHERN METHODIST UNIVERSITY, 87 S.W. (2d) 918, 131 Texas 333, 115 S.W. (2d) 622.

The contract in question was involved in a State Court stockholders suit in which one of your Petitioners, Dollert, Pratt-Hewit Oil, and Houston Oil were formal parties and which was brought as a class suit for the benefit of all stock-

holders of Pratt-Hewit Oil and in which the issue of fraud, anti-trust, monopoly and usury were involved and decided adversely to Pratt-Hewit Oil and its stockholders after pending in the trial and appellate courts of Texas from 1927 to 1937, which decision was pleaded in the instant case as res adjudicata. *HARTFORD LIFE INS. CO. v. IBS*, 237 U.S. 662, 59 L. Ed. 1165; *ASHWANDER v. TENNESSEE VALLEY AUTHORITY*, 297 U.S. 288, 80 L. Ed. 688.

The Contract in question was recognized in another State Court suit in which both of your Petitioners, Reed and Dollert, Pratt-Hewit Oil, and Houston Oil were formal parties and which suit was pending in the trial court from 1933 to 1938, which recognition was pleaded in the instant case as estoppel. 21 *CORPUS JURIS* 1228, Sec. 232; *DAVIS v. WAKELEE*, 156 U.S. 680, 39 L. Ed. 578.

The alleged acts of fraud, the Rooke lease deal and the Heard lease deal, which were alleged in the instant case to have procured the contract in question, were fully disclosed by deposition of the Secretary of Pratt-Hewit in 1926 in a Federal Court suit in which Pratt-Hewit Oil was a formal party.

The alleged act of fraud, the Rooke lease deal, which was alleged in the instant case to have been one of the two procuring causes of the contract in question, was fully disclosed in still another State Court suit in which Pratt-Hewit Oil was a formal party by a verified pleading of Houston Oil Company filed in 1936 in the suit.

Only findings of fact and conclusions of law and final judgment and not an opinion were filed in the Trial Court in the instant case, thus the case in the Trial Court is unreported and does not appear in *FEDERAL SUPPLEMENT REPORTER*. In the opinion in the Circuit Court of Appeals, reported 132 Fed. (2d) 748, the judgment of the Trial Court is affirmed by the Court saying that while there were many

issues raised by plaintiffs and many defenses presented by defendants in the court below "the findings and conclusions of the District Court are free from error" and without the Circuit Court of Appeals pronouncing one proposition of law or citing one case. Therefore, the decision of the Circuit Court of Appeals merely decides that the correct result was reached by the Trial Court as between the parties, and such opinion could not and does not conflict with any State or Federal decision. Therefore, we fail to see any "special and important reasons" or any questions of sufficient national or local importance why a review on Writ of Certiorari should be granted. Certainly the Circuit Court of Appeals has not decided any Federal question and has not rendered a decision in conflict with the decision of another Circuit Court of Appeals, and has not decided an important question of local law in conflict with applicable local decisions and has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court so as to call for an exercise of the Supreme Court's power of supervision. Since the District Court and Circuit Court of Appeals have found the facts the same way, we submit that it is not incumbent on the Supreme Court to review the evidence and facts. *PAGE V. ARKANSAS NATURAL GAS CORP.*, 286 U.S. 269 (271), 76 L. Ed. 1096 (1098). "The denial of a writ of certiorari imports no expression of opinion (by the Supreme Court) on the merits of the case." *ATLANTIC COAST LINE R. CO. V. PANE*, 283 U.S. 401 (403), 75 L. Ed. 1142 (1143).

We therefore submit in the words of the Trial Court in his findings "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil), one of which was a shareholders' suit."

WHEREFORE, these Respondents respectfully pray that

the Writ of Certiorari prayed for herein be in all things denied and refused.

Respectfully submitted,

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April 8, 1943, Houston, Texas



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT
Petitioners

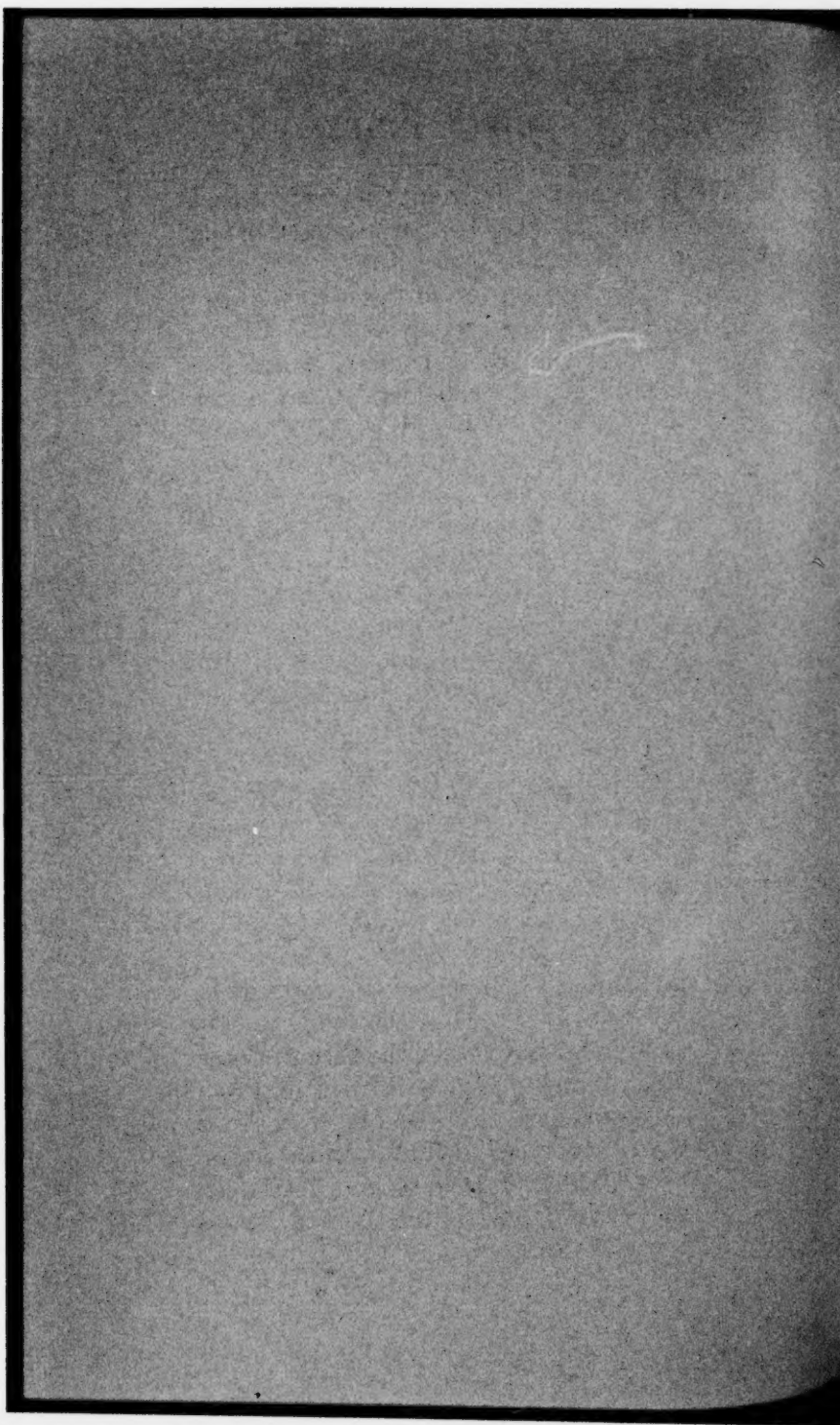
v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

**REPLY BRIEF OF PETITIONERS TO THE
BRIEF OF RESPONDENTS, HOUSTON OIL
COMPANY AND HOUSTON PIPELINE
COMPANY**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

**REPLY BRIEF OF PETITIONERS TO THE
BRIEF OF RESPONDENTS, HOUSTON OIL
COMPANY AND HOUSTON PIPELINE
COMPANY**

*To the Honorable Chief Justice of the United States
and the Associate Justices of the Supreme Court
of the United States:*

Inasmuch as respondents, Houston Oil Company
and Houston Pipe Line Company, in their brief just
filed with this Court, have raised and argued as de-

fenses res judicata, estoppel, laches, stale demand, and the statutes of limitation, questions as to which the opinion of the Circuit Court of Appeals of the Fifth Circuit is silent, it becomes necessary for petitioners to ask leave of this Court to file their reply to those contentions of said two respondents.

The silence of the opinion of the Circuit Court of Appeals on the defenses pleaded by respondents, the Houston Oil Company and the Houston Pipe Line Company, apparently is taken by said two respondents as sustaining their before mentioned special defenses in full and with the same effect as though the Circuit Court of Appeals had in its opinion especially sustained each and every one of these defenses. Such clearly being the assumption of said two respondents, then

I. The Decision of the Circuit Court of Appeals in Sustaining the United States District Court Judgment is in Conflict.

- (a) **With the Decision of this Court as to a Federal Question, when the Circuit Court held, namely, that a Dismissal of a Stockholders' Class Action in Vacation Time, With "Prejudice," Without Notice by a State Court, Does Not Violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.**

The Circuit Court of Appeals of the Fifth Circuit has decided a Federal question in affirming the de-

cision of the Federal District Court which, in turn, approved the action of a state district court in dismissing a stockholder's class action in vacation time without previously giving or even attempting to give notice to about 400 stockholders of the Pratt-Hewit Corp. that the case was to be dismissed with *prejudice*, thereby depriving the stockholders without the due process of law of their right to prosecute said action in behalf of their corporation as guaranteed to them by the Fifth and Fourteenth Amendments of the Constitution of the United States, in a way deemed untenable and in conflict with the recent decision of this Court in the case of *Hansberry v. Lee*, 311 U. S. 32, 61 S. Ct. 115.

In brief, the state case was one in which W. E. Hewit, one of the promoters of the Pratt-Hewit Corporation venture and a stockholder of that corporation, filed suit in behalf of himself and other stockholders against the Pratt-Hewit Corporation, Houston Oil Company, Thomas H. Pratt, individually, and all of the other directors and officials of the Pratt-Hewit Corporation, on September 28, 1927, in the District Court of Refugio County, Texas, to cancel the September 28, 1925 contract on various grounds, as set out in paragraphs 18-25 inclusive and plaintiffs' Second Amended Complaint (Tr. R. 326-332) however, not for the fraud set out in the present cause of action. The evidence of this fraud was concealed in the private files of the Pratt-Hewit Corporation and of Thomas H. Pratt and was not discovered until the spring of 1939, as has already been shown in the petitioner's application for certiorari.

F. F. Dollert intervened in that state court case by his own attorney, a Mr. Booth of San Antonio, Texas. Five or six other stockholders also intervened in this case which went to the Supreme Court of Texas on a technical point of procedure.

On January 26, 1937, during vacation time, upon the request of plaintiff Hewit and intervenors, except F. F. Dollert, and also upon the written request of the Houston Oil Company and the officials of the Pratt-Hewit Corporation, the case "was dismissed with prejudice at the cost of the defendants." The judge of that court, the Honorable J. P. Poole, had disqualified himself from sitting in the case. He was obliged to qualify himself before the case could be dismissed by him. This proceeding, including the dismissal of the action, is to be found on pages 223-228 of the Transcript of Record. No notice of any kind that the case was to be taken up in vacation time and that it was to be "dismissed" with prejudice" was sent out to a single stockholder. Most of the 400 stockholders were living in Wisconsin. No testimony was taken when the case was dismissed. Dr. Dollert, who lived and practised his profession in Milwaukee, Wisconsin, testified that he had no notice that the case was to be dismissed and knew nothing about the dismissal until about 18 months thereafter. (Tr. R. 804) By the time this case was tried in March, 1941, Mr. Booth, Dollert's attorney had died. No evidence was offered by the defendants that notice of contemplated dismissal of the case had been given him.

Mr. Reed testified that he knew nothing about the bringing of this suit until this case was brought. (Tr. R. 812).

When this state court case was dismissed on January 26, 1927, it is undisputed that the shareholders of the Pratt-Hewit Corporation except those who appeared on that day and by their attorney signed the application to have the case dismissed with prejudice, were simply ignored. Nothing was done or attempted to be done to protect their rights.

The right of representation by the plaintiff in a derivative stockholders' suit, that is, in a true class action, empowers the plaintiff, if acting in good faith and not disqualified because of conflicting interest or otherwise and the shareholder himself does not intervene, with the right to prosecute the suit to judgment, but it does not carry an implied unqualified right to dismiss with prejudice or compromise the action without giving full and adequate notice of his proposal to do so, giving necessary conditions involved in the compromise or reasons for dismissal and making proof of such efforts to apprise the absent shareholders thereof to the satisfaction of the Court that said shareholders have had adequate notice to satisfy the requirements of "due process of law" of the Fourteenth Amendment of the United States Constitution so as to permit the judge to enter the order of "dismissal with prejudice."

The absentee shareholder has a vested right as

to which the plaintiff stockholder has no right to do as he pleases. Certainly, the plaintiff stockholder cannot enter into any arrangement that would divest a distant stockholder of his property right without full and adequate notice first being given to such absentee stockholder. If that is not true and the law in the case, then any compromise or settlement made, being binding upon the absentee stockholder, would deprive him of the due process of law guaranteed to him by the Fifth and Fourteenth Amendments of the Constitution of the United States. To permit such practice would open the door to the greatest of frauds.

The Constitution of the United States does not compel the states to adopt any particular phraseology in writing their rules of procedure to be followed by their courts in order that the requirements of the Fourteenth Amendment "due process of law" clause may be met, but it does require the states to adopt and put in force *some kind* of procedure or rules to be followed by the courts sufficient to satisfy the constitutional rights guaranteed every citizen of the United States by the Fourteenth Amendment as expressed in its "due process of law" clause. *Hansberry v. Lee*, 311 U. S. 32, 61 S. Ct. 115.

No procedure of any kind was followed or attempted to be followed by which the rights of the absent shareholders could have been protected. The judgment entered, therefore, on the face of the record is void as to the shareholders of the Pratt-Hewit Corporation, including Dollert and Reed, except as

to those who were present by themselves personally or by their attorneys.

“When the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co. v. Rupp*, 235, U. S. 261, 273.” *Hansberry v. Lee* (Supra).

- (b) With the Decision of this Court as to a Federal Question, when the Circuit Court held, namely, that in a Stockholders' Class Action where the Suit is Dismissed with Prejudice in Vacation Time, the Corporation, although Nominally a Defendant, is the Real Plaintiff, is Attempted to be Represented by an Officer, also a Defendant, and his Private Attorney, Does Not Deprive the Corporation of Due Process of Law as Guaranteed to It under the 14th Amendment of the U. S. Constitution.

The Circuit Court of Appeals of the Fifth Circuit has decided a Federal question in affirming the decision of a Federal District Court, which, in turn, approved the action of a state district court in *dismissing with prejudice* a stockholders' class action when the corporation in whose behalf the suit was

brought by the stockholders was not represented by its own attorney but was attempted to be represented by an officer of the corporation, also a defendant, and by his private attorney, thereby depriving said corporation, although nominally a defendant, in fact, a plaintiff, without the due process of law, of the right to have the suit prosecuted in its behalf to judgment, or if the case is to be settled or dismissed, to have the advice and aid and counsel of its own attorney, as guaranteed to such corporation by the Fifth and the Fourteenth Amendments of the Constitution of the United States, in a way deemed untenable and in conflict with *Hansberry v. Lee* (Supra) and other decisions of this Court.

In the foregoing suit in the state court, of *Hewitt et al v. Pratt-Hewitt Corporation, Houston Oil Company, and Thomas H. Pratt et al*, while the Pratt-Hewitt Oil Corporation was nominally a defendant, nevertheless, it was the real plaintiff. Thomas H. Pratt and each one of the officials and directors were defendants. A dismissal of the suit would be highly beneficial to the defendants Thomas H. Pratt and the directors of the Pratt-Hewitt Corporation, but greatly prejudicial to the Pratt-Hewitt Corporation itself. That presented a direct conflict of interest with duty between directors and officials and their corporation, which disqualified them from consenting to a dismissal of the suit with prejudice on behalf of the Pratt-Hewitt Corporation, in fact, wholly disqualified them from advising or acting in behalf of the Pratt-Hewitt Corporation in this suit. The answers of Pratt and of the Pratt-Hewitt Corpora-

tion were each verified by Pratt and were signed by Attorneys Crain and Vandenberg.

Attorneys Crain and Vandenberg were the private attorneys for Thomas H. Pratt and the other directors and officials of the Pratt-Hewit Corporation and also represented the Pratt-Hewit Corporation during this entire litigation and at the time the case was dismissed. (Tr. R. 225-228). These attorneys likewise were disqualified from representing the Pratt-Hewit Corporation. Their signature to the request for and consent to entering judgment of dismissal with prejudice is a nullity. The Pratt-Hewit Corporation is not bound by that judgment. Being a nullity, it is not *res judicata* at least so far as the Pratt-Hewit Corporation and its stockholders including Dollert and Reed, are concerned.

In the case of *Blaustein v. Pan Am. Pet. & Transp. Co.*, 21 N.Y.S. (2d) 651, page 729, the Court held that the attorney for a parent corporation was disqualified from rendering an opinion for its subsidiary in a matter involving conflict between the parent and subsidiary corporation.

- (c) **With the Decisions of the Texas Courts as to Local Law, when the Circuit Court held, namely, that a Burden of Proof as to whether the Decision of a State Court was *Res Judicata* upon the Plaintiffs Reed and Dollert and Not upon the Defendants in the United States District Court.**

The decision of the Circuit Court of Appeals in affirming the decision of the United States District Court which held that the burden of proof as to whether the decision of the State District Court in the former case of Hewit et al v. Pratt-Hewit Corporation et al was res judicata was upon plaintiffs Reed and Dollert and not upon the Houston Oil Company and the Houston Pipe Line Company who plead res judicata, is a decision of local law in a way probably in conflict with the decisions of the Supreme Court and other courts of the State of Texas.

In the motion of the Houston Oil Company to dismiss plaintiffs' second amended complaint, among other exhibits attached, there was Exhibit C which was a copy of the record in the case of Hewit et al v. Pratt-Hewit Corporation et al, Case No. 795, in the District Court of Refugio County, Texas, and it is to be found on pages 186-228 of the Transcript of Record. On pages 223-228 is to be found the request for dismissing the case during vacation time and the judgment of dismissal with prejudice which, as we have just seen, on its own face is void, at least as to the Pratt-Hewit Oil Corporation, petitioners Reed and Dollert and the stockholders of the Pratt-Hewit Corporation, except those who were present in person or by their attorneys. This record of this judgment was pleaded by the Houston Oil Company and the Houston Pipe Line Company. They are therefore bound by what the face of this judgment roll indisputably shows.

The burden of proof that a former judgment, according to the decision of Texas courts, and probably in all jurisdictions, is upon him who pleads such a defense.

“As a general rule, a person claiming that a former judgment is *res judicata* has the burden of proving that fact. He must show that the judgment was a final and valid adjudication, rendered on the merits of the controversy, between him and his adversary. If the judgment was pleaded in bar, he must show that it definitely disposed of the claim or demand that forms the subject matter of the suit; and if it was pleaded as an estoppel, he must show that it necessarily decided the issue as to which he claims it is *res judicata*.” 26 Tex. Jur. Sec. 510, p. 340. See also *Pye, et al v. Wyatt*, 151 S. W. 1086, and many other Texas cases cited.

The Houston Oil Company and the Houston Pipe Line Company have not only failed to make good the burden of proof which is on them but that which they did offer as evidence in the question of *res judicata* clearly shows that the judgment in the case of *Hewit et al v. Pratt-Hewit Corporation et al* in the State Court is not *res judicata* in the instant case.

Reed, Dollert, and the Pratt-Hewit Corporation and its stockholders being strangers to the judgment, could assail the same on any ground which a party thereto could urge on a direct attack.

“It is a familiar rule that in the case of a col-

lateral attack upon a judgment by a party there-to every reasonable presumption is indulged to support the judgment. *Treadway v. Eastburn*, 57 Tex. 211; *Hardy v. Beaty*, 84 Tex. 567, 19 S. W. 778, 31 Am. St. Rep. 80. But it is equally as well settled that that rule has no application when the judgment is invoked against one not a party to the suit in which it was rendered, and that such a stranger may attack it on any ground which can be urged in a direct attack. *Scales v. Wren*, 103 Tex. 304, 127 S. W. 164; *Sanger Bros. v. Trammel & Co.*, 66 Tex. 361, 1 S. W. 378; *Blankenship v. Wartelsky*, 6 S. W. 140; *Bonner v. Ogilvie*, 24 Tex. Civ. App. 237, 58 S. W. 1027." *Turner v. Maury*, (Civ. App.) 224 S. W. 255. Reversed on other points (Com. App.) 244 S. W. 809.

"But whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained." *Freeman on Judgments*, Fifth Edition, 632.

We have already seen in the petition for certiorari that the affirmance by the Circuit Court of Appeals of the decision of the United States District Court in holding that the September 28, 1925 contract, on its face, is legal, is directly in conflict with the statutes and the decisions of the Texas courts. This is discussed and authorities cited in a petition of certiorari as to the unlawful delegation of the managerial powers of the Pratt-Hewit Corporation on

pages 42 to 48, as to Usury on pages 48-53, and on Monopoly and Anti-Trust Laws on pages 52-56.

The September 28, 1925 contract, inasmuch as it contains a number of provisions which directly violate the laws of Texas and which are in conflict with the court decisions of that state, on its face is void. It, therefore, never was a contract. It never has had any existence. "There is no power which can breathe life or validity into it." *Myers v. Walker*, 276 S. W., 305, 307. (Tex. Civ. App.)

"A void judgment has been termed mere waste paper, an absolute nullity; and all acts performed under it are nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. It is good nowhere and bad everywhere, neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." 25 Tex. Jur. Sec. 254, p. 693.

For further Texas authorities on this question see pages 76 and 77 of petitioner's application for certiorari.

- (d) **With the Decision of the Texas Courts as to Local Law, when the Circuit Court held, namely, that Plaintiffs Reed and Dollert "Were Estopped to Deny such Contract (September 28, 1925) because in a Final Agreed Judgment Entered in 1938 in still another Suit Filed in 1933 in a State Court They had Recognized Such**

Contract," when Plaintiffs had No Knowledge of the Fraud Perpetrated in the Making of the September 28, 1925 Contract, which is Void on its Face.

The decision of the Circuit Court of Appeals, in affirming the decision of the United States District Court, which held that plaintiffs Reed and Dollert "were estopped to deny such contract (September 28, 1925) because in a final agreed judgment entered in 1938 in still another suit filed in 1933 in a state court they had recognized such contract" (Respondents Houston Oil Company et al, brief, page 3), even though plaintiffs had no knowledge of the fraud and the contract itself is void on its face, is a decision of local law in a way probably in conflict with the decisions of the Supreme Court and other courts of Texas.

In the case filed in the state court in 1933 the validity of the September 28, 1925 contract was not in issue. In this case the Houston Oil Company and the Pratt-Hewitt Corporation and a great many other parties were sued on an entirely different question. Furthermore, this suit was disposed of in April, 1938, a year before the first evidence of fraud as detailed in the 18 Overt Acts in the petition for certiorari, was discovered. Furthermore, "in order to assert an estoppel by conduct, the position of the parties must have been altered to the injury of the party asserting the right of estoppel." *Walker v. Millican*, 150 Ky. 12; 150 S. W. 71. See also 31 C.J.S. 275. "The doctrine of estoppel is available only for protec-

tion and cannot be used as a weapon of assault.”
Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618.

The Houston Oil Company et al neither plead injury nor did they ever offer any evidence showing damages by the conduct now claimed as an estoppel.

When a contract of a corporation is prohibited by statute or is against public policy or is beyond the powers conferred upon the corporation by the legislature, neither the corporation nor the shareholder suing in its behalf is estopped to assert its invalidity.

“The contract was an executory one, and the rule is thoroughly established that when money has been paid on an illegal contract it can be recovered as long as the contract remains executory. *Levy v. Crawford*, 5 Tex. Civ. App. 293, 23 S. W. 104; *McCall v. Whaley*, 52 Tex. Civ. App. 646, 115 S. W. 658. Appellant is not seeking to enforce an illegal contract, but he wants the money back obtained from him through a fraudulent and void contract. He seeks to disaffirm and destroy the illegal contract and have both parties placed in the same position they occupied before the void contract was made. *Federal Life Ins. Co. v. Hoskins*, 185 S. W. 607. If the contract for the policy was illegal, appellee will not be permitted to profit by it, but will be forced to return the money and leave the parties as they were when the contract was made.”
Trammel v. San Antonio Life Ins. Co. (Tex. Civ. App.) 209 S. W. 786, 789.

In *Sherman & Ellis Inc., v. Indiana Mutual Casualty Co.*, (CCA, 7) 41 2d 588, the Court held Void an

agreement made between Sherman and Ellis, Inc., and the Indiana Mutual Casualty Company in which the latter conferred the management of its affairs upon Sherman and Ellis, Inc., for a period of 20 years.

The Court said: (Evans, Cir. Judge).

“Estoppel. Appellant contends that, even though the contract be void, the Casualty Company is estopped to assert such invalidity. Little need be said respecting this contention. The law is clear, we think, that a corporation which makes a contract void because the corporation making it was without authority so to do, because against public policy, is never estopped to assert its invalidity. The reason for its invalidity was known to both parties when the contract was executed. 7 R. C. L. 530; *Central Lafayette Railroad Co.*, 50 Ind. 112; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 59, 60; 11 S. Ct. 478, 35 L. Ed. 55.”

When a contract of a corporation is beyond the powers conferred upon it by existing laws or is prohibited by statute or is contrary to public policy, then “to maintain such actions is not to affirm but to disaffirm the unlawful contract.” *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 59, 60, 11 S. Ct. 478, 35 L. Ed. 55.

In the case at bar, plaintiffs Reed and Dollert, in behalf of the Pratt-Hewit Corporation, are not claiming any rights or damages through the illegal contract but are suing to cancel the contract and

have the property restored to the Pratt-Hewit Corporation which it owned in September 28, 1925, the date of the unlawful contract, together with the oil and gas which has been taken out from underneath the leases and which was in place under said leases on September 28, 1925.

“U. S. Md. 1822. One may not claim a right springing out of his own wrong. The Arrogante Barcelones, 20 U. S. 496, 7 Wheat 496, 5 L. Ed. 507.” Fed. Dig. Vol. 29, p. 651.

Neither estoppel, res judicata, laches, limitations, waiver or consent can create a legal right out of that which a statute, public policy or public law says is nothing.

“C.C.A. Ga. 1938. One guilty of fraud cannot urge estoppel against the other party to the contract for the purpose of making his fraud effective. New York Life Ins. Co. v. Odom, 93 F. (2d) 641, certiorari denied. Odom v. New York Life Ins. Co. 58 S. Ct. 948, 304 U. S. 566, 82 L. Ed. 1532.” Fed. Dig. Vol. 29, p. 651.

- (e) **With the Decision of the Texas Courts as to Local Law, when the Circuit Court held, namely, that Plaintiffs Reed and Dollert Owed a Duty to the Defendants in Failing to have Discovered the Fraud Complained of and were, therefore, Guilty of Laches.**

The decision of the Circuit Court of Appeals in affirming the decision of the United States District

Court, which is to the effect that the plaintiffs, Reed and Dollert, owed a duty to the defendants, that of discovering the fraud (the bribing instruments) of which they now complained in their complaint, namely, Exhibits 9-13 inclusive, (Tr. R. 911-944) Exhibits 37 (Tr. R. 973) and the four loans with which the Houston Oil Company accommodated Pratt, is a decision of local law in a way probably in conflict with the Supreme Court and other courts of Texas.

The following is the Court's Finding of Fact No. 12, Tr. R. 514 and 515.

"Now the plaintiff Reed at the time he acquired his stock by assignment from Elsie Essman on May 11, 1927, knew, or he should have known, of the existence of this suit. At least he should have known about it during the year of 1927 when it was brought. He knew of it during subsequent years or he could have known of it by the exercise of any degree of diligence whatever, and he knew that it was a suit making general charges of fraud and mismanagement on the part of Pratt, and especially attacking the execution of the contract of September 23, 1925.

The Court's Finding of Fact No. 13, Tr. R. 515, reads as follows:

"Neither the plaintiff Reed nor the intervener Dollert took a single step, so far as the record shows, to determine the truth of the averments of fraud that were made or to locate the evidence now tendered in support of the charge of fraud.

The evidence that they now assert to show that there was a purchase of Pratt's official discretion, by the exercise of reasonable diligence, by searching the files of Court cases pending or disposed of, and by the taking of depositions, could have been obtained long before the filing of this suit, and the plaintiff Reed and intervenor Dollert could have learned of the existence of the documents upon which they now rely as evidence of fraud. So far as the record before me shows, there was no attempt made to mislead or deceive them by anybody. . . ."

Conclusions of Law, No. 6, (Tr. R. 519) says:

"Since both the plaintiff and the intervenor knew of the pendency of the suit in the State District Court of Refugio County and knew of the general charges made in the various letters to the stockholders to the effect that the contract of September 28, 1925 was in fraud of the rights of the stockholders of the corporation, and since Dollert, the intervenor, was a party to that suit, and since both intervenor and plaintiff could have known or could have learned of the existence of the very evidence now relied upon by them to show fraud, they have been guilty of laches and of such delay in the bringing of this suit, that they are not entitled to maintain it now."

The foregoing Findings of Fact and Conclusions of Law are to the effect that if rumors of fraud had come to a stockholder in Wisconsin, in order to prevent the stockholder's right of action being barred by laches, it was such stockholder's duty to have come to Texas, not only to examine the record in the

county clerk's office in Refugio County in which all deeds and mortgages and oil and gas leases are recorded, but also the Court says "by searching the files of court cases pending or disposed of and by taking depositions, could have been obtained long before the filing of this suit, and the plaintiff, Reed, and intervener, Dollert, *could have learned of the existence of the documents* upon which they now rely as evidence of fraud." That means, of course, that all State and Federal courts in Refugio and adjacent counties where litigation might be pending or had been disposed of and in which some evidence might have been discovered of fraud committed by Pratt and other officials of the Pratt-Hewit Corporation, the records and the testimony must be examined. But the testimony in every case is not transcribed, or if it had been, would be in the possession of the party who paid for having it transcribed.

The Court said, "The evidence that they (plaintiff Reed and intervener Dollert) now assert to show (Exhibits 9-13, 37, and the loans) . . . by the taking of depositions, could have been obtained long before the filing of this suit, and the plaintiffs Reed and Dollert could have learned of the existence of the documents upon which they now rely as evidence of fraud." But depositions cannot be taken until suit has been filed unless it is for the purpose of perpetuating the testimony of some important witness who may die before litigation can be commenced.

Until a complaint is filed and issues joined, just what right of examination and just what the exam-

ination would be about would be unknown. With no suit commenced, with what authority could anyone be subpoenaed to appear before an officer who had the right to take testimony and compel such party to give evidence? Is not the party who is to be examined entitled to know what it is all about? Train fare from Wisconsin to Texas and taking depositions cost time and money. Supposing the stockholder has only invested two or three hundred dollars in the venture.

Of the bribery instruments, Exhibits 9-13, and 37, only one to this day has ever been put of record. That is the lease which F. B. Rooke and wife gave to their son, A. D. Rooke, on a 200 acre tract. That instrument, recorded, gives no information as to what transpired thereafter. Standing by itself, it is perfectly harmless. Assume that there was a rumor of fraud. Just how could the suspecting stockholders have discovered the loans which the Houston Oil Company extended to Pratt with no records anywhere, except in the books of account of the Houston Oil Company?

The term "fraud" is a conclusion of law derived from acts committed. Fraud may be committed in hundreds of different ways. It gives no indication whatsoever as to what the acts were which constitute fraud. Just where would one look to find what those facts were?

The Finding of Fact shows "so far as the record before me shows, there was no attempt made to mis-

lead or deceive them by anybody." Then how did it happen that all three, the Houston Oil Company, Pratt and A. D. Rooke, to this day, failed to put their instruments of record? Why did Pratt keep all of this information away from the stockholders of the corporation during all his lifetime?

(1) The Victim of a Fraud Owes No duty to Him Who Perpetrated it.

"Whatever may be the rule with reference to the use of diligence to discover fraud, we hold in this instance that owing to the relation of parties, as above set forth, plaintiffs were under no duty to exercise diligence to discover the over charges (even if they could have reasonably done so) until they came into possession of facts sufficient to cause them to distrust defendants and to put an ordinary prudent person on inquiry." *El Paso Electric Co. v. Reynolds Holding Co.*, 100 S. W. (2d) 97, 102 (Tex. Com. App.)

"Section 73, p. 162 N. 2 Fiduciary Relationship Excuses Inquiry. *Wichita Royalty Co. v. City Nat. Bank* (Sup.) 89 S. W. (2d) 394, 405, 406, modifying 74 S. W. (2d) 661, rehearing denied 93 S. W. (2d) 143." Tex. Jur. 1937 Supplement p. 1831.

"... one who is guilty of an affirmative fraudulent misrepresentation of a fact cannot urge that the defrauded party could have discovered the truth had he diligently made investigation. This rule has been followed by the court in subsequent cases (see *Buchanan v. Burnet*, 102 Tex. 492, 495, 119 S. W. 1141, 132 Am. St. Rep. 900)

and would appear to be applicable here. Whether so or not, however, we think the relationships existing and the facts and circumstances above stated were sufficient to excuse the failure of Maxwell sooner to investigate and discover the true facts upon which his suit was predicated." *Trinity-Universal Ins. Co. v. Maxwell*, 101 S. W. (2d) 606, 611.

"Failure to make inquiry which would reveal existence of fraud and so start statutes of limitation to run against defrauded party may be excused where the relationship of trust and confidence existed between the parties. This is also true where the conduct or continued representations of the guilty party are such as to lull the injured party into a sense of security or to conceal suspicious circumstances." *Trinity-Universal Ins. Co. v. Maxwell* (Tex. Civ. App.) 101 S. W. 606, 611, Error dismissed. Citing—20 Tex. Jur. 114, Sec. 76.

(2) The Registration in the County Clerk's Office in Texas of an Instrument Representing a Fraudulent Claim Does Not Operate as a Constructive Notice.

"The registration in the county clerk's office of a deed, by law, constructive notice of a bona fide transfer or ownership, from the date of registration; for the law has designated that office as a proper place for the registration of such transactions; but the law has made no such provision for the registration of frauds. It is true that registration is a notorious act, which in time would create a presumption of notice of a fraud, but whether such notice would be pre-

sumed in one or ten years is a question of fact to be decided by a jury." *Andrews v. Smithwick*, 34 Tex. 544.

"While it is true they could have gone to the deed records of the county and there discovered that no transfers to the oil company had been rendered, yet it cannot be said, as a conclusion of law, that such a discovery, standing alone, as a further conclusion of law, would have made them chargeable with knowledge of the further fact that no such transfer had been executed, and that defendant had never intended to execute one, or that the oil company had never owned any assets." *Thomason v. McEntire* (Tex. Civ. App.) 233 S. W. 616, affirmed 113 Tex. 220, 254 S. W. 315.

"The Supreme Court has said, however, that 'neither a registration of a deed in the county clerk's office, nor the records in the adjutant general's office, could operate as constructive notice of the fraudulent claim from the date of registration or other record.' (*Andrews v. Smithwick*, 34 Tex. 544). And there is authority to the effect that, with respect to the diligence of a beneficiary in discovering a trustee's fraud in failing to pay over the proceeds of a note, the registration of a release of the note was not notice to the beneficiary. Needless to say, a party will not, by reason of a failure to examine the records, be chargeable with knowledge of facts which may not be ascertained therefrom." 28 Tex. Jur. 163.

"Recording of mineral deed fraudulently represented to plaintiff as a mere lease held not to be constructive notice to plaintiff of fraud so as

to set the statute of limitation running. *Straud v. Pechacek*, (C.A.) 120 S. W. (2d) 626." Tex. Jur. 1939 Supp. p.

(3) Rumors and Suspicion are Insufficient to Charge Notice

"Circumstances which merely arouse suspicion in the mind of a reasonably prudent person are generally regarded as insufficient to charge notice" *Billingsley v. Mossler Acceptance Co.*, 119 S. W. (2d) 196 (Tex. Civ. App.); *General Motors Acceptance Corp. v. Fowler*, 36 S. W. (2d) 589, 590, 46 C. J. 548.

"But it is clearly settled that 'vague and indeterminate rumor or suspicion, is quite too loose and inconvenient in practice to be admitted to be sufficient.'" *Wethered v. Boon*, 17 Tex. 143; *Myers v. Crenshaw*, 112 S. W. 1125 (Tex. Civ. App.).

The District Court's Findings of Fact and Conclusions of Law are to the effect, first, that the victim of a fraud owes a duty to the guilty party of using reasonable diligence in discovering the fraud, second, that a recorded fraudulent instrument is constructive notice of the fraud. That is not the law in Texas, as the foregoing cases clearly show, nor in any other states, nor in the Federal courts. If it were, then those engaged in defrauding the public could put themselves in the safety zone where they would be unmolested by the courts in selling stock or oil and gas leases to people living in distant states, just so they were careful not to sell to anyone

except small investors who could not afford making investigations. If such would be the law, then it would mean that whenever a citizen bought stock, it would be necessary for such purchaser to engage an investigator to make periodical searches of the records to make certain that those who were handling his money were not perpetrating a fraud upon him. It is evident that the question of law involved in the District Court's Findings and Conclusions of Law is one of paramount interest to the public.

The Circuit Court of Appeals said "The findings and conclusions of the District Court are free from error."

The first definite inkling as to the existence of the bribing instruments was not until March or April, 1939. Furthermore, the payoff on the royalty bribe of a 3/32 interest in the 200 acre Rooke lease has continued each month and is being paid each month since September 1, 1925. Each payment is a part of the original fraud. This has been shown in the petition for certiorari, pages 78-84.

The length of the time in which the fraud is concealed is immaterial. In the case of *Fleishhacker et al v. Blum et al*, 109 Fed. (2d) 543, *Blum v. Fleishhacker*, 21 Fed. Supp. 527, the time between the commission of the fraudulent act which consisted of Fleishhacker, president of a bank, putting himself in a position where self interest conflicted with duty, until the case was filed, was 15 years. That is about the same time that elapsed between the date of the

September 28, 1925 contract and when the complaint was filed in the instant case in February, 1941.

II. The District Court's Finding of Fact, Last Paragraph of Transcript of Record 517, which was Sustained by the Circuit Court of Appeals, that the Loans which the Houston Oil Company Extended to Thomas H. Pratt Were Used by Him for the Benefit of the Pratt-Hewit Corp. is Wholly Unsustained by the Evidence.

On page 8 of the respondents', Houston Oil Company et al, brief, it is stated "Petitioners in their complaint, alleged nothing about the loans made by the Houston Oil Company to the secretary (Thomas H. Pratt) of the Pratt-Hewit Oil Corporation, but on their appeal claimed that this was fraud in securing said contract." At the time the suit was filed and for some time thereafter plaintiff knew nothing about the four loans totaling \$14,500 which had been extended to Pratt by the Houston Oil Company. This evidence was not discovered until about two months before the case went to trial when through the order of the Court the plaintiffs were permitted to examine the account books of the Houston Oil Company.

There is no evidence whatsoever in the record to support the findings of the District Court just referred to.

The testimony of Fairbrothers, the supervising accountant of the Houston Oil Company, is to be

found on pages 768-780 in the Transcript of Record. He testified definitely from the page in the Houston Oil Company's account books which recited the loans made to Thomas H. Pratt, of which there were four, that they were Pratt's and not the loans of the Pratt-Hewit Corporation, that is, the notes were signed by him personally and not as an officer of the Pratt-Hewit Corporation.

The September 28, 1925 instrument, in fact, was primarily a loan contract. (Exhibit 4, Tr. R. 876) Loans totaling nearly \$100,000. were provided for in paragraphs "I," "IV," and "V." This money was not loaned on a contingency but the agreements required that the money be repaid by the Pratt-Hewit Corporation definitely. Each loan calls for the payment of interest at 6% and was secured by a mortgage lien to be given by the Pratt-Hewit Corporation.

Inasmuch as the loans extended to Thomas H. Pratt were kept on a separate page, there must have also been a separate account in the books of the Houston Oil Company where the loans called for and described in the September 28, 1925 contract were specially kept, so that there could be no confusion in the books of the Houston Oil Company as to what were the loans extended to Thomas H. Pratt personally and what were the loans extended to the Pratt-Hewit Corporation, and which Pratt signed as an official representing that corporation.

The only evidence which was offered at the trial

of the case that any of the money loaned Thomas H. Pratt was used for the benefit of the Pratt-Hewit Corporation was the first loan of \$5,000. This evidence consisted of excerpts from a deposition taken by written interrogatories put to Mr. Pratt for answer in a case which was filed in the Federal Court at Victoria, Texas, on September 28, 1925, 16 years before the case at bar was tried. In this early case the Pratt-Hewit Corporation was plaintiff and Pratt himself and W. E. Hewit and O. R. Seagraves were parties defendant. This suit was brought to cancel a gas contract made April 26, 1923. Consequently, the parties and the issues are not the same in the two suits. Objections to the introduction of said affidavit were properly made but overruled. (Tr. R. 844-863).

The Pratt-Hewit Corporation was organized on April 16, 1923. On that same day, through its incorporators, it conveyed to Hewit and Pratt individually all the natural gas in place underneath the 23,000 acres of oil and gas leases which had just been conveyed to the Pratt-Hewit Corporation and which had on it two big producing natural gas wells. The consideration for this contract was that Pratt and Hewit would find a market for the gas discovered and which was being produced. In this they failed. They then conveyed this gas contract to O. R. Seagraves in 1924. Between July, 1924 and March 1, 1925, Pratt eliminated Hewit, the other promoter, as president and director of the Pratt-Hewit Corporation. Hewit was working with O. R. Seagraves of Moody and Seagraves who then owned the nat-

ural gas contract which the Houston Oil Company wanted. Pratt played with the Houston Oil Company.

Thus O. R. Seagraves and Pratt himself and Hewit, by virtue of this gas contract, stood in the way of making the September 28, 1925 contract between the Houston Oil Company and the Pratt-Hewit Oil Corporation. Consequently, on August 27, 1925, Pratt had the directors of the Pratt-Hewit Corporation pass a resolution which was also signed by Pratt as a director and again as a secretary, which stated that Thomas H. Pratt and W. E. Hewit had breached their contract with the Pratt-Hewit Corporation of April 16, 1923 and authorized Pratt and the company's president, Mr. Sharp, to institute suit in behalf of the Pratt-Hewit Corporation against Pratt himself and W. E. Hewit and O. R. Seagraves to cancel the gas contract. This is the "Overt Act" No. 7 mentioned on page 9 of the petition for certiorari.

Two days thereafter, on August 31, 1925, the Houston Oil Company secretly loaned Pratt \$5,000. This Overt was Act No. 8

It was in this suit which was filed in the Federal Court at Victoria on the same date that the September 28, 1925 contract was executed, that Pratt's deposition by written interrogatories was given and from which excerpts certified by the United States District Court were offered in evidence at the close of the instant case without giving any notice what-

soever to the opposing attorneys or without submitting the original whole deposition which the attorneys for the Houston Oil Company promised and failed to do. (Tr. R. 844, 845).

"It is to be borne in mind that depositions taken in other actions are not to be received in evidence, unless the parties are the same or in privity, and unless the issues are substantially the same. To admit evidence of such character would deprive the party against whom the deposition is offered of the right of notice, and of the right to attend and cross-examine the witness." Jones on Evidence, (2d) 851.

The last interrogatory in the deposition was No. 103. Whether there were any more is not known. Out of No. 103, the excerpt contained only about one-fourth of the questions.

Mr. Blades, the attorney for the Houston Oil Company, stated the purposes for which the deposition was to be offered, which were two:

(a) "This deposition will show that Mr. Pratt admitted back on March 30, 1936 that he did have the 3/32 interest in the 200 acre lease." (Tr. R. 845)

"Cross Interrogatory No. 15:

Do you own any oil or mineral leases on lands in Refugio County which do not appear of record?

Answer:

Yes; an undivided three-thirty-seconds in two hundred acres."

"Cross Interrogatory No. 17:

If you have answered either of the three foregoing questions affirmatively, then state what such leases are, when you acquired them, why you have not recorded them if they are not recorded, and why they were not taken in your own name if they are held for you by any other person or corporation? And in this connection, give the names of the persons who hold such oil and mineral leases for you?

Answer:

About August 1st, 1925, I leased from Clinton Heard one hundred acres, which is recorded. I did not record the three-thirty-seconds, as all parties had actual notice." (Tr. R. 849)

This is all there is in Mr. Pratt's deposition as to that $\frac{3}{32}$ interest in the A. D. Rooke lease. Consequently, as to the question of notice to petitioners of the fraud complained of now in the present suit, these two interrogatories clearly disclose nothing.

(b) Before introducing the affidavits, Blades also said: "It also explains the first loan (June 6, 1925, \$5,000) that the Houston Oil Company made

to Mr. Pratt, being for the purpose of buying casing to go down in one of the Pratt-Hewit wells on the Heard Tract."

Therefore, Mr. Blades, attorney for the Houston Oil Company, does not contend that the other three loans were in fact loans made in behalf of the Pratt-Hewit Corporation and his contention that the first \$5,000 loan was used for such purposes is not borne out at all by the deposition of Pratt.

In Cross-Interrogatory No. 12, Pratt was asked whether he had received or borrowed money from the Houston Oil Company or the Houston Pipe Line Company. His answer was "In April, 1923 and constantly thereafter until I got it, I asked Seagraves and Moody to furnish us casing for Heard No. 2, the deep test well, and they constantly refused Some time the last of May, I think, I went to Houston and Galveston, at Mr. Moody's request. When in Houston, I went to see Mr. Buckner, of the Houston Oil Company, and talked with him. He said: 'I will get you the casing, Mr. Pratt,' took up the phone and inquired the price of six inch casing. I did not want to take the casing from the Houston Oil Company or Mr. Buckner, and I said to Mr. Buckner: 'If you really want to see a deep test on the Heard well, you should buy a note of the corporation due me for five thousand dollars, and in that way, if I have to buy the casing, I can pay a substantial amount on it.' Mr. Buckner took the notes and looked at them and said: 'They may be good and they may not; anyway, I will take a chance.' So Judge Kennerly drew up the note

for me to sign and attached the corporation notes for five thousand dollars as collateral." (Tr. R. 848-849)

This cannot possibly be either one of the two \$5,000 loans,

(a) because they were made on June 6 and August 31, 1925, two years later than the \$5,000 loan to Pratt by Buckner to which was attached a collateral \$5,000 note payable to Pratt and signed by the corporation because, as Pratt testified, this was some time either in April, 1923 or the latter part of May in the same year. (Tr. R. 848)

(b) Fairbrothers testified that as to the first note of June 6, 1925, "I fail to find any record of security on that one." (Tr. R. 773) Fairbrothers made no mention of the second \$5,000 note being secured, as is testified from the record, which means there was no collateral given because in reading his testimony it is clear that where collateral was given his record makes mention of it.

Fairbrothers further testified that Pratt personally paid the interest of \$122.50 on the two notes on October 1, 1925, the date when the two notes were consolidated, and a new one of \$10,000 given by Pratt personally. (Tr. R. 775) He also testified that with the consolidation note signed by Pratt personally of \$10,000, dated October 1, 1925, there was filed a collateral note of \$5,000 of the Pratt-Hewit Corporation dated October 1, 1925, due in three months, but the

record did not show to whom the collateral note was made payable. Undoubtedly, it must have been made payable to Pratt or else it would have been of no value to the Houston Oil Company.

In this deposition of Thomas H. Pratt, only one more loan is spoken of and that is on the bottom of page 852, Tr. R., and in Cross Interrogatory No. 50, propounded to Pratt, this is the question.

“Isn't it a fact that the Pratt-Hewit Oil Corporation executed a deed of trust on the 30th day of September, 1925, on all of the property of the Pratt-Hewit Oil Corporation, to the Houston Oil Company, to secure the payment of a note for \$10,000.00, executed by the Pratt-Hewit Corporation, bearing interest at the rate of six per cent per annum?

Answer: Yes, it is of record and speaks for itself.”

On page 854 of the Transcript of Record, Pratt testifies that Sharp, president of the Pratt-Hewit Corporation, helped him negotiate this loan with Buckner and that *the first time they spoke to the Houston Oil Company about this was on September 26, 1925.*

Certainly, it would be folly for anyone to contend that the two foregoing \$10,000 notes are in fact one and the same.

That is all that Mr. Blades, the attorney for the

Houston Oil Company, offered to support his contention that the money of the first loan of \$5,000 which was on June 6, 1925, or of any other loan, was used for buying casing for the Pratt-Hewit Oil Corporation and, as there was no other evidence offered by any of the other defendants at any time attempting to show that any of the money which Pratt borrowed from the Houston Oil Company was used for the purposes of the Pratt-Hewit Corporation, that leaves Blades' contention and the United States District Court's Finding of Fact No. 17, namely, "All the evidence seems to indicate that any moneys loaned at the time of or prior to September 28, 1925, were used by Thomas H. Pratt for the benefit of Pratt-Hewit Corporation in the development of that company's properties." (Tr. R. 517) without any foundation whatsoever.

Furthermore, why should the Houston Oil Company and the other defendants go to ancient documents and records to prove that some of this money which Pratt borrowed from the Houston Oil Company was in fact loans to the Pratt-Hewit Corporation, when the account books of the Houston Oil Company and the Pratt-Hewit Corporation would have answered that question beyond a doubt? During the trial of the case, the two Pratt-Hewit corporations were fighting side by side with the Houston Oil Company and were working together.

The burden of proof, as this Court said in *Pepper v. Lytton*, 308 U. S. 295, that the dealings of a dominant stockholder and an official of his corporation are

“subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the directors or stockholders.”

However, there is another record in this case which indisputably shows that not one single dollar of the \$14,500 loaned to Pratt by the Houston Oil Company was used in buying any equipment or paying any of the expenses of the Pratt-Hewit Corporation. When E. H. Buckner bought his 4/32 interest in the 200 acre lease from Pratt, Exhibit 13, Tr. R. page 940, the \$18,571.40 was not paid in cash but as follows:

“(1) *The assumption by the said E. H. Buckner to pay to the Houston Oil Company of Texas the sum of Five Thousand and no/100 Dollars, (\$5,000.00) upon the Note of Thomas H. Pratt to said Oil Company, bearing date, the 1st day of October, 1925. Said note being for Ten Thousand and no/100 Dollars (\$10,000.00) but the amount thereof assumed by the said Buckner being Five Thousand and no/100 Dollars (\$5,000.000).*

For the balance of the purchase price E. H. Buckner gave Thomas H. Pratt twelve installment notes, one being payable each month, bearing interest at 6%.

The attempt to torture Pratt's answer to Interrogatory No. 12 or any of his answers in his deposition as evidence that the first loan of \$5,000 of June 6,

1925, or any part of any of the four loans, was used for the benefit of the Pratt-Hewit Corporation, in the light of the foregoing, is juggling with truth.

III. The Knowledge of Officials and Directors Is Not Imputed to the Stockholders.

In the brief of the Houston Oil Company et al, on page 11, it is stated: "The alleged act of fraud, the Rooke lease deal, was fully disclosed in still another State Court suit in which Pratt-Hewit Oil was a formal party by a verified pleading of Houston Oil Company filed in 1936 in the suit. " Whatever knowledge Pratt or the other directors and officers had as to the fraudulent acts of Pratt may not be imputed to plaintiffs or any other stockholders of the corporation, and also does not bind Pratt-Hewit Corporation.

"It is, of course, well established that the officers and directors of a corporation are not the agents of the stockholders, and the stockholders are not chargeable with knowledge of the business transactions which it undertakes; that is to say, they have no duty as stockholders to inquire into the nature of the business or to influence the management, and, of course, they have no reason to suppose that the management will cause the corporation to engage in ultra vires acts. *Rudd v. Robinson*, 126 N.Y. 113, 26 N. E. 1046, 22 Amer. St. Rep. 816; *Hughes v. Wachter*, 61 N. D. 513, 238 N. W. 776; *Commercial Savings Bank v. Kietges*, 206 Iowa 90, 219 N. W. 44; *Harrison v. Remington Paper Co.* (8th Cir.)

140 F. 385." *Nettles v. Childs*, 100 F. (2d) 952, 957.

" Knowledge of the fraud upon the part of the directors is not knowledge on the part of the stockholders, and the fraud cannot be ratified or waived by the directors so as to bind either the corporation or the stockholders." *Fletcher on Corporations*, Per. Ed. Vol. 2, Sec. 548, p. 429, citing *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Simon v. Vulcan Oil & Mining Co.* 61 Pa. St. 221.

"But as a general rule, an officer whose interests are adverse cannot bind the corporation except as to innocent parties, and if he aids the third party of a fraud against the corporation, notice to him is not imputed to the corporation." *Hildebrand on Texas Corporations*, (published 1942) Vol. 2, p. 957 citing *Greer v. Franklin Life Ins.* 109 S. W. (2d) 305 and *First Tex.*, etc. *Bank v. Chapman* 48 S. W. (2d) 651, 654 (Appeal Dismissed).

Respondents, *Houston Oil Co. et al*, in their brief, on page 10, state:

"Usury cannot be predicated upon a transaction whereby repayment of any amount under the contract rests upon a contingency of production of minerals, or upon a joint venture in which the parties pool their resources with the expectation of making a profit."

There is nothing contingent in the loans provided for in the September 28, 1925 contract, Exhibit 4, Tr.

876, in paragraphs "I," "IV," and "V," because, according to the contract, the Pratt-Hewit Corporation was obligated to repay the principal at a definite time and the interest on each loan at 6% annually. The usurious interest which consisted of a $\frac{1}{2}$ interest in *all the real and personal* property of the corporation was paid immediately. The September 28, 1925 contract in itself was a sufficient immediate conveyance of an undivided $\frac{1}{2}$ interest without any further written transfer.

On the 29th day of September, 1925, the very next day, the Pratt-Hewit Corporation, by written instrument, conveyed to the Houston Oil Co. an undivided $\frac{1}{2}$ interest in and to said leases, which were about 23,000 acres, "together with an undivided $\frac{1}{2}$ interest in and to all oil and/or gas wells on said property covered by said leases, and the equipment of every kind and character of said wells, and all personal property on said lands covered by said leases and used in connection with the development or proposed development thereon." Exhibit 6, Tr. R. 892, copied in full on page 343 of the Transcript of Record. Two leases seem to have been omitted in this conveyance and therefore on November 9, 1925, the Pratt-Hewit Corporation conveyed a $\frac{1}{2}$ interest in said two leases omitted in the other conveyance to the Houston Oil Co. (Tr. R. 349).

The conveyance of the $\frac{1}{2}$ interest which the Pratt-Hewit Corporation was compelled to make to the Houston Oil Co. is the part of the contract which makes the loan usurious.

The $\frac{1}{2}$ interest in 23,000 acres of oil and gas leases which already had on it two producing natural gas wells, each capable of delivering into the pipe line approximately 80,000,000 cubic feet of gas a day, was sufficient proof to show that the value of the undivided $\frac{1}{2}$ interest in said real and personal property made the loans highly usurious. That interest was paid when the September 28, 1925 contract was made and the subsequent conveyance was executed. There was no contingency in these transactions.

Respondents, Houston Oil Co. et al., cite the case of Pansy Oil Co., 91 S.W. (2d) 453. This case holds that a loan is not usurious where promise to pay sum above the legal rate of interest depends upon a contingency and not upon the happening of a future event. The undivided $\frac{1}{2}$ interest which made the September 28, 1925 contract usurious, as we have just seen, was immediately conveyed to the Houston Oil Co. absolutely, with no condition whatsoever attached to the conveyances and the interest of 6% was made payable annually, all being secured by mortgage liens on the property of the Pratt-Hewit Corporation.

In the other case cited, *Burton v. Steyner*, 182 S. W. 394, the Court said:

"It will be observed that there is no guarantee in the Aransas Pass contract that any certain profit will be made, or even that the principal will be repaid; but a method is provided whereby appellee is to be paid the capital invested and his profits before Burton and Danford get anything.

... . In other words, if Burton and Danford did not make a success, he would lose his investment."

In this same case the Court also said:

"It is true that, if the original transaction be tainted with usury, that the vice would follow the debt in whatever form it may assume. First Nat. Bank of Montague, 34 S. W. 1042."

On page 9 of their brief, respondents, the Houston Oil Co. et al, state: "When two corporations make a joint operating contract on certain land, this does not create a monopoly, etc." That assumes a conclusion to be a fact, which is disputed.

"In Webster we find 'joint' to mean, involving the united action of two or more. 'Done or produced by two or more working together'." Barr v. Missouri Pac. R. Co. (Mo.) 37 S. W. (2d) 927, 930.

The phrase "joint operating contract" is a conclusion derived from a series of facts. The provisions of two certain paragraphs of the September 28, 1925 contract have been discussed on pages 16-24 in the petition for certiorari, and on pages 22-23 in the motion for rehearing which is the same as pages 1065-1076 of the Transcript of Record. Where the contract gives to one of the companies the exclusive right to drill wells for the production of oil and gas and where the same company, therefore, alone has the right to expend the money and do all the marketing,

and sells the gas to a subsidiary to which it is the alter ego, thus sitting on both sides of the bargain table when the price of gas is fixed, leaving nothing to the other company except the privilege of paying $\frac{1}{2}$ of all the cost of production and marketing the gas and oil, that is not a joint operating company. That same assumption of a conclusion that the September 28, 1925 contract is a joint operating contract constitutes the entire argument of said respondents on the same page of the brief which is, that said contract does not violate the anti-trust laws of Texas and does not constitute an unlawful delegation of the managerial powers of the Pratt-Hewit Corporation to the directors of the Houston Oil Company.

The only case which the respondents, Houston Oil Company et al, cite in support of their contention that the September 28, 1925 contract does not violate the Anti-Trust and Monopoly Statutes of Texas and that it does not contain an unlawful delegation of the managerial powers of the Pratt-Hewit Corporation to the Houston Oil Company is the case of *Starke v. Guffey Petroleum*, 98 Texas, 542, on page 9 of their brief. In this case the corporation had given an oil and gas lease on the only land it had for a period of 20 years carrying a royalty of 10% of all the oil and gas produced.

The Court said that there was only one question in the case, namely, plaintiff's contention that "because the land leased was the only land owned by the company on which it could conduct its corporate business of mining, and the lease was therefore an abandon-

ment of the corporate business for which it was organized." The Court said: "The lease in question is for twenty years, and being authorized by statute, we are to consider it as legal, unless something be shown in connection with it which would invalidate it."

The case merely presented a question of whether or not the corporation had attempted to engage in a line of business for which it had not been organized. That certainly is an entirely different question than those involving violation of monopoly and anti-trust laws and unlawful delegation of powers by officials and directors of a corporation to officials of another company. The differences between these two are so clear and elemental that the case cited requires no further discussion.

In the brief of the respondents, Houston Oil Company et al, on page 2, it is stated that plaintiffs are seeking a cancellation of the September 28, 1925 contract. Among other grounds were "excessive considerations in connection with two deals made by the Houston Oil Company with Thomas H. Pratt, one involving the F. B. Rooke 200 acre lease, etc."

While in plaintiff's second amended complaint, in paragraphs 20 and 21, Transcript of Record 330, it is stated merely as a question of fact and one which has never been denied in any of the answers of any of the defendants, that the A. D. Rooke lease "was unproved oil and gas acreage and therefore of little value; that nevertheless E. H. Buckner paid to Thom-

as H. Pratt \$8,000 cash for his 4/32 undivided interest and the Houston Oil Company for its 7/32 undivided interest approximately \$50,000 in cash;" there is no allegation in the complaint to the effect that because the Houston Oil Company and Buckner paid an excessive price for the interest that they bought, that therefore the contract should be canceled.

In paragraph 29 of plaintiff's second amended complaint, (Tr. R. 338), it is stated that the acts of Pratt "constituted a gross abuse of trust and confidence, a sale of discretions that makes illegal and void the transactions and contracts, especially the September 28, 1925 contract out of which the fraud arose. The law also absolutely inhibits an officer or director of a corporation from placing himself in a position where his own private interests would make him neglectful of his obligations to the corporation and the stockholders."

In none of the briefs of the plaintiffs has it been contended that the contract of September 28, 1925 should be canceled because the Houston Oil Company and Buckner paid Pratt an "excessive price" for what they bought from him.

Plaintiffs have contended repeatedly in every brief that has been filed and argued before the United States District Court, as shown on pages 58 and 59 of the petition for certiorari, "The gist of this action is this, that an officer of a corporation cannot have interests that will conflict with his duties to the corporation." Yet counsel for the defendants have never

spoken one word or cited a single authority in their arguments before the Court nor discussed nor cited a case in their briefs in the way of opposing said contention that the instant that an officer of a corporation places himself in a position where self interest conflicts or may conflict with duty, the fiduciary relationship is dissolved by the act and his right to represent his corporation has ceased. Nor did the attorneys at any time even attempt to contend that what Pratt did did not conflict with the duty he owed his stockholders. A discussion of that question has been studiously avoided by the defendants' attorneys.

In reading the brief of the respondents, the Houston Oil Company et al, it was impossible not to notice that only once when Thomas H. Pratt was spoken of therein is his name given and that is on page 2. Thereafter, throughout the entire brief, or ten times in all, he is referred to simply as the "Secretary." In 1925, when the Houston Oil Company needed and in fact must have gas to supply its market requirements, Pratt was the only official of the Pratt-Hewit Corporation with whom the Houston Oil Company dealt, whom it accommodated with loans, from whom it bought an interest in the lease, the evidence of such purchase up to this date being kept secret in the company's vaults. From the organization of the company until his death Pratt was not only the secretary but the treasurer who signed all checks and the resident manager who carried on all dealings with the Houston Oil Company for the Pratt-Hewit Corporation. He also was the dominant stockholder owning considerably more than 1/3 of the stock, the

dominant official and director whose instructions the other directors implicitly followed. Yet, in respondents' brief he has dwindled to just a "Secretary."

It is pronouncedly evident that underneath this litigation there lies one fundamental question out of which all the other issues have arisen, and that is, may an officer of a corporation place himself in a position which conflicts or tends to conflict with his duty to the corporation and its stockholders without thereby having forfeited his right to represent his corporation in its dealings with the third party, the company who abetted him in betraying his cestui? Petitioners are at a loss to understand why it should be necessary to be compelled to appeal to this Court for an answer as to whether or not the collusive instruments and contracts entered into by Pratt and the Houston Oil Company present such an attempt by Pratt at serving dual conflicting interests.

The conflict of personal interest with duty is not something which happened merely in 1925 but, as we have seen, through the 3/32 leasehold interest, Pratt had a continuous monthly income paid to him by the Houston Oil Company, during all of which time he was dealing with the Houston Oil Company for his corporation. This did not end with his death. Each month, even during the time that this case was pending in the United States District and Circuit Courts and right now while it is in this Court, the income from this leasehold interest is being paid to the heirs of Thomas H. Pratt, one of whom is Laura J. Shaw,

a daughter of Thomas H. Pratt. Her husband, M. A. Shaw, shortly after the death of Thomas H. Pratt, became the president and a director of both Pratt-Hewit Corporations and still holds such positions. There is daily production from these leases and therefore daily conflict exists between Shaw's personal interest and his duty to the two corporations.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

NO. 877

WERT T. REED AND F. F. DOLLERT,
Petitioners
v.

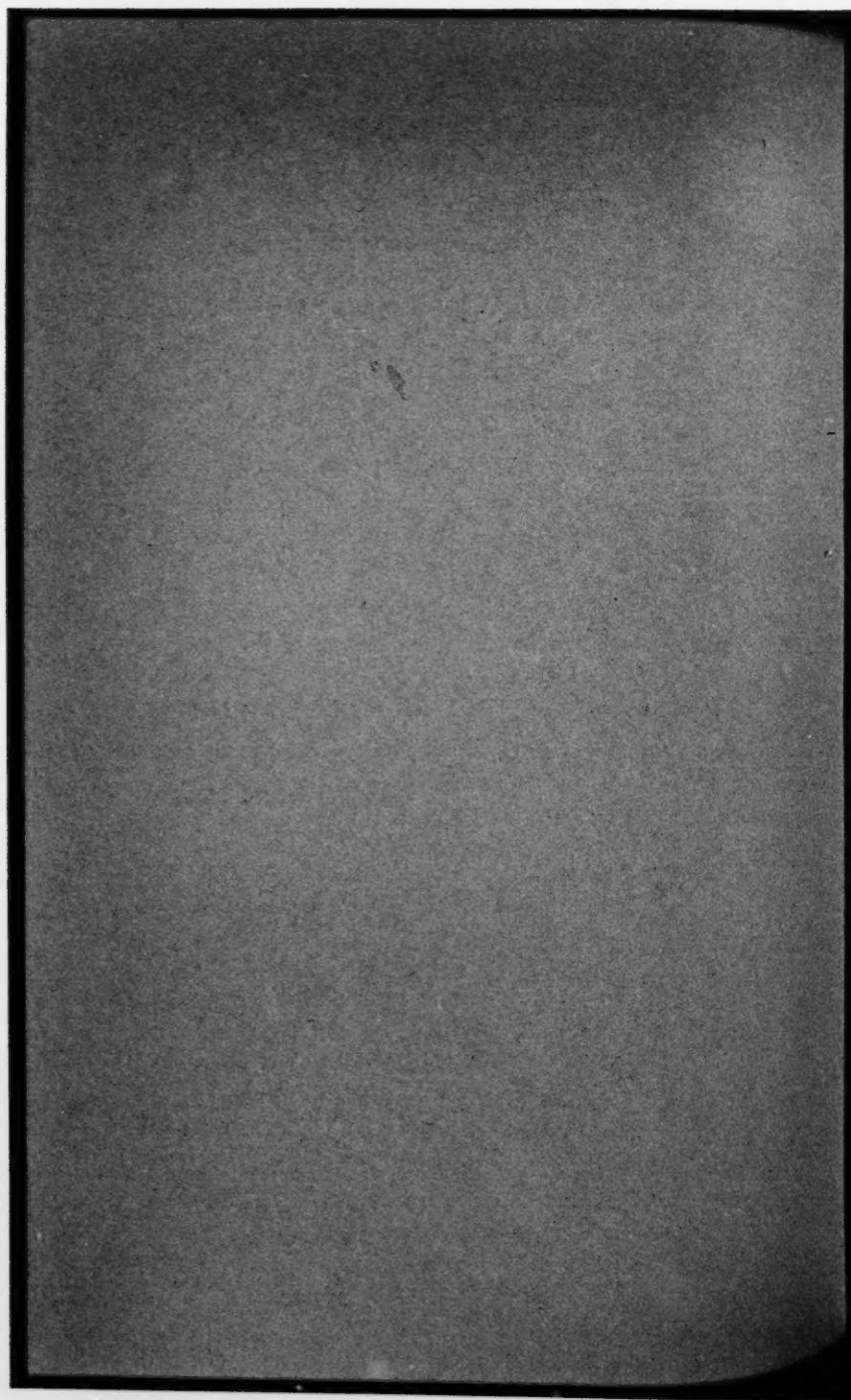
HOUSTON OIL COMPANY OF TEXAS, ET AL,
Respondents

PETITION FOR REHEARING

ARTHUR H. BARTELT,
Austin, Texas

W. B. RUBIN,
Milwaukee, Wisconsin
Attorneys for Petitioners

FIRM FOUNDATION—AUSTIN



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

NO. 877

WERT T. REED AND F. F. DOLLERT,
Petitioners
v.

HOUSTON OIL COMPANY OF TEXAS, ET AL,
Respondents

PETITION FOR REHEARING

*To the Honorable Chief Justice of the United States
and the Associated Justices of the Supreme
Court of the United States:*

I. Where the Inevitable Result Arising from the Failure of a Federal Court to Make a Finding on a Decisive Issue Presented to It is that One Man's Property has been Given to Another, Even on a Local Question, the Constitutional Requirements of the Due Process of Law as Provided in the Fifth Amendment of the Constitution of the United States have been Invaded and the Jurisdiction of this Court is thereby Invoked. *Fayerweather v. Ritch*, (N. Y. 1904) 195-U. S. 276, 298, 25 S. Ct. 58, 49 L. Ed. 193.

The necessary result arising from the failure of the Circuit Court of Appeals to make a finding on the questions presented to it, namely,

- (a) Did Thomas H. Pratt forfeit his right to represent the Pratt-Hewit Corporation in the making of the September 28, 1925 contract with the Houston Oil Company, thereby making said contract void ab initio, because of the undisputed many private secret financial dealings he was having with the Houston Oil Company?
- (b) Was the September 28, 1925 contract void and against public policy on its face because of its provisions being prohibited by Texas statutory law?

was to leave the Houston Oil Company unlawfully in possession of the property it had taken from the Pratt-Hewit Corporation under the pretended contract and also to deny the latter an accounting for the oil and gas taken from the property by the former without there having been first a judicial determination of the question presented to the Circuit Court of Appeals, thereby bringing into this litigation at this point the involvement of the Fifth Amendment of the Constitution of the United States in the taking of petitioners' and the Pratt-Hewit Corporation's property without due process of law, thereby invoking the jurisdiction of this Court.

The finding of the Circuit Court of Appeals "that there was no fraud" may not be construed to have decided the jurisdictional questions (a) whether Thomas H. Pratt's secret dealings with the Houston Oil Company disqualified him from representing his company in the making of the September 28, 1925 contract, thus making it void ab initio and (b) wheth-

er the September 28, 1925 contract is on its face prohibited by Texas statutory law and therefore void and against public policy, making the alleged instrument incapable of creating any rights in the Houston Oil Company or anyone else. Nor does the finding of the Circuit Court of Appeals that "the findings and conclusions of the District Court (Tr. R. 507-520) are free from error" contain a finding on the foregoing jurisdictional questions presented to the Circuit Court because the latter are not to be found in the District Court's Findings of Fact and Conclusions of Law.

II. Due Process of Law Requires that there be The Co-existence of Three Things—Notice, Adequate Opportunity of Being Heard, and a Finding on the Issue Presented.

While the courts in their opinions usually in attempting to name the requisites of due process of law, mention Notice and Adequate Opportunity of Being Heard, nevertheless, if the third element, the Finding on the Issue Presented is lacking, the requisites of the Due Process of Law under the Fifth and the Fourteenth Amendments, have not been met. The presence of the third is as necessary to the presence of Due Process of Law as is the third support to the usefulness of a tripod.

Because the courts do not always mention the third element, it does not mean that that is not essential. It is not mentioned because it is rarely absent. But such absence does not militate against its impor-

tance. Merely taking volumes of evidence and making findings on issues other than those which are vital to the question of whether one of the parties has been deprived of his property in violation of the requirements of due process of law, and when the failure to make a finding on the decisive issues in the case necessarily results in depriving one of the parties of his property, such proceeding falls far short of being a judicial determination fulfilling the requirements of the due process of law provision of the Fifth and the Fourteenth Amendments of the United States Constitution and also of Article I, Sect. 19 of the Texas Constitution—"the due course of the law of the land."

Fayerweather v. Ritch (N. Y. 1904) 195 U. S. 276, 298, 25 S. Ct. 58, 49 L. Ed. 193

Syllabus—"Where the appellants' contention is that the Circuit Court, by giving unwarranted effect to a judgment of a state court and accepting that judgment, which contained no finding of one of the fundamental facts as a conclusive determination of that fact, deprived him of his property without due process of law, and that contention is made in good faith, and under the circumstances, upon reasonable grounds, the application of the Constitution is involved and this Court has jurisdiction of a direct appeal from the Circuit Court." Justice Brewer:

"Our jurisdiction of this direct appeal from the decisions of the Circuit Court is invoked on the ground that the case invokes the application of the Constitution of the United States.

"The contention is that by Article V of the

amendments to the Federal Constitution no person can be deprived of life, liberty, or property without due process of law; that these plaintiffs were entitled to large shares of the estate of Daniel v. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of the state courts; that this action of the Circuit Court is not to be considered as a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure.

“In Chicago, Burlington etc. Railroad v. Chicago, 166 U. S. 226, we held that a judgment of a state court might be here reviewed if *it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defenses was not absolutely conclusive upon the question of due process.*”

(Nature of the case just cited. This was a condemnation proceeding brought under the condemnation statute of Illinois. Notice and opportunity to be heard was given defendant according to the letter of the statutes of Illinois. A jury fixed the just compensation of the various owners whose property had been taken and fixed that of the plaintiff at \$1.00).

“We said (Chicago, Burlington R. R. Co. v. Chicago 166 U. S. 226):

‘Nor is the contention that the railroad company has been deprived of its property without due process of *law entirely met by the sugges-*

tion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this Court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the Court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard met the requirement of due process of law.

(Note—This paragraph although from the preceding case 166 U. S. 226 precedes the following quotation):

‘But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not form. This Court, referring to the 14th Amendment, has said: ‘Can a state make anything due process of law which, by its own legislation, it chooses to declare such?’ To affirm this is to hold that the prohibition of the state is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. Davidson v. New Orleans, 96 U. S. 97, 102. The same question could be propounded and the same an-

swer should be made, in reference to judicial proceedings inconsistent with the requirements of the due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that Amendment.'

"And again (pp. 236, 237) we said:

'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used in due process of law, if the necessary result be to deprive him of his property without compensation.'

"If a judgment of a state court can be reviewed by this Court upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to) *a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution.* It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of the releases; that notwithstanding

this, that Court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question and rendered their judgments upon that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate, without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such a decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. *supra*. Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of wrongful character of the proceedings in the state courts and the necessary results therefrom. We are of the

opinion that the jurisdiction of the Court must be sustained."

The Court, in its opinion in the foregoing case, very clearly states the reason upon which it took jurisdiction in the following language: "The contention is not that the state courts erred in their finding in respect to this fact, but that *there never was any finding.*"

So in the case at bar in which "there never was any finding" *either in the Circuit or the District Courts*, on the question whether Pratt had disqualified himself from representing his corporation in the making of the September 28, 1925 contract, thereby making the contract void in its attempted inception, and the question whether that contract on its face was prohibited by various Texas statutes and therefore was void and against public policy, and was as though it never existed and therefore was incapable of creating any rights in behalf of the Houston Oil Company or anyone else, the inevitable result coming from the failure of either the District Court or the Circuit Court of Appeals to make a finding on said questions, has resulted in the taking away from the Pratt-Hewit Corporation of one-half of all the property, personal and real, and one-half of the production of oil and gas from said property since 1925 and giving it to the Houston Oil Company, all in violation of the Fifth Amendment of the Constitution of the United States and of Article I, Section 19 of the Constitution of Texas. Furthermore, every day since September 28, 1925, this unlawful taking of oil and gas from the Pratt-Hewit Corporation by the Houston

Oil Company has been going on and is still going on daily i nthe face of all this litigation, making mockery of law and of the courts.

“We may examine proceedings in state courts for appropiation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner’s right to compensation. If the necessary result was to deprive him of property without just compensation, then due process of law was denied him contrary to the Fourteenth Amendment. Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 246; Backus v. Ritch, 195 U. S. 276, 298. Our concern is not whether to ascertain whether the rule adopted by the state is the one best supported by reason or authority nor with mere errors in the course of trial but with denial of a fundamental right.” McCoy v. Union Elevated R. R. Co., 247 U. S. 354, 363 (1917).

III. Discussion of Question, Whether Pratt Had Disqualified Himself from Representing His Company.

The Circuit Court made no finding on the issue that Pratt had placed himself in a position where his personal dealings with the Houston Oil Company had disqualified him ipso facto from representing his corporation in its making of the September 28, 1925 contract, thus making said instrument void. These business dealings are listed and described on pages 9-12 in the petition for certiorari and also on pages 11-18 in the petition for rehearing.

The only findings made by the Circuit Court of Appeals were the following: (a) That "the findings and conclusions of the District Court are free from errors." (b) That there "was no fraud."

The answer to the finding (a) is that the District Court made no finding on that question whatsoever. Therefore, the deficiency of the decision of the Circuit Court of Appeals in its failure to make a finding on the foregoing issue presented to it cannot be remedied by falling back on the findings of fact and conclusions of law of the District Court, on which issue they are silent. See the Findings of Fact and Conclusions of Law which are to be found on pages 509-520 of the Transcript of Record.

Finding (b) "that there was no fraud" does not constitute a finding on the question whether Pratt's private personal dealings with the Houston Oil Company, which are not and cannot be disputed, put Pratt in a position where his private interests conflicted or tended to conflict with the duty he owed his corporation and its stockholders, thereby making void the September 28, 1925 contract.

It was charged in the second amended complaint that Pratt, as an officer and director of the Pratt-Hewit Corporation, could not place himself in a position where his own private interest would make him neglectful of his obligation to his stockholders; that Pratt's personal dealings with the Houston Oil Company made the September 28, 1925 contract illegal and void; that at no time (said instrument) became

a valid contract but was iniquitous and void in its inception,"; that the Houston Oil Company did not acquire a property right in the property of which it took possession, by virtue of said instrument, but that equity impressed said property with a constructive trust with the Houston Oil Company as constructive trustee, and the Pratt-Hewit Corporation as cestui que trust. (Tr. R. 338)

During the trial of the case the Court made the remark "Now they don't deny the execution of those instruments. There is no dispute about it. . . . " To which counsel replied "The gist of this action is this:—that an officer of a corporation cannot have interests which will conflict with the duties of the corporation. He cannot represent the Pratt-Hewit Corporation and be receiving these sums of money from the Houston Oil Company at the same time." (Tr. R. 721-723) (Pet. Certiorari 59)

Likewise, the issue that Pratt had disqualified himself from representing his corporation in attempting to negotiate the September 28, 1925 contract in behalf of his corporation with the Houston Oil Company, by virtue of his secret dealings with the Houston Oil Company and that company's abetting him in this with its money made the contract void, was argued extensively at the hearing of this case in the Circuit Court of Appeals and discussed at length in appellants' brief filed with that court.

The term "fraud" is a conclusion of law arising from a fact or series of facts which can be infinite in

number. However, there is one thing certain. It cannot be tortured to include the mere act of a fiduciary placing himself in a position which would excite conflict between self interest and duty, because that occurs very frequently without any fraud or fraudulent intent accompanying it. Yet the forfeiture of the right of representation by the fiduciary of a beneficiary must immediately give way when such conflict arises "to the stern demands of loyalty." Such is the decision of this Court in the case of *West v. Camden*, 135 U. S. 507, 10 S. Ct. 838, 34 L. Ed. 254.

In that case of *West v. Camden*, the agreement was one made personally by Camden, a director and stockholder of a corporation, that West should be permanently retained as vice-president of that company at a salary of \$5,000 a year. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in the personal liability of Camden for damages, the agreement was of a character to place defendant's personal interests in possible conflict with the best interests of the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void, not because a *fraud was perpetrated or contemplated*, but because the contract was against public policy, even though there would not have been any direct gain to the promisor, the defendant.

The facts thus clearly disclose that this contract was against public policy and void for one sole reason, that is, it placed defendant's interest in direct conflict with the duty he owed to his corporation's stockholders.

In the case of *Nabours v. McCord*, 80 S. W. 595, the Supreme Court of Texas said:

"No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

"The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors." p. 600.

The Supreme Court of Texas in the same case gives the reason why the law must be such in a relationship between a fiduciary and his beneficiary when that Court said:

"The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." *Nabours v. McCord*, 80 S. W. 595, 598, 599 (Tex. Sup. Ct.)

Justice Cardozi in *Wendt v. Fischer*, 243 N. Y. 328, 443, 154 N. E. 303, 304, said that the instant that the conflict of interest with duty arises "the law

'does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, (conflict of self-interest with duty) and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case.'

"The Court's uncompromising adherence to the rule of undivided loyalty 'does not rest upon the narrow ground of inquiry or damage to the corporation resulting from a betrayal of confidence, but upon broader foundations of a wise public policy that, for the purpose of removing all temptation, extinguish all possibility of profit flowing from a breach of the confidence imposed by fiduciary relation . . . a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.' *Guft v. Loft Inc.*, Del. Supp., 5 A (2d) 503, 510. 'The rule based on public policy of removing temptation completely from the office of a fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty which prevailed.' *Blaustein v. Pan American Pet. & Transpt. Co.*, 21 N.Y.S. (2d) 651." *Overfield v. Pennroad Corp.*, 42 F. Supp. 586, 608.

For further authorities and discussion see pages 33-42 in the petition for certiorari.

The uncompromising adherence to the principle involved in the foregoing question which the Circuit

Court of Appeals failed to answer lies at the base of every form of fiduciary relationship and arises frequently in American jurisprudence and as said in *Bailey et al v. Jacobs*, 325, Pa. 187, 189 Atl. 320, "Indeed upon them rests the entire structure of the law of corporate administration."

True, the foregoing is local law. But when the Circuit Court of Appeals failed to pass upon the issue just discussed and the District Court also, with the result that the Houston Oil Company was permitted to retain the property it had unlawfully taken from the Pratt-Hewit Corporation, the silence of the Circuit Court of Appeals effectuated the taking of the Pratt-Hewit Corporation's property by the Houston Oil Company in violation of the Fifth Amendment of the Constitution of the United States and of Sect. 19, Article 1 of the Texas Constitution.

IV. The Inevitable Result Arising from the Failure of the Circuit Court of Appeals to Make Any Findings on the Two Issues is Also to Deprive the Pratt-Hewit Corporation and the Petitioners of their Property in Violation of the "due course of the law of the land" of the Bill of Rights of the Constitution of Texas, Article 1, Sect. 19.

The result arising from the failure of the Circuit Court to make a finding on the two issues that have been discussed herein, namely, the taking of the Pratt-Hewit Oil Corporation's and its stockholders' property by the Houston Oil Company through the pretended September 28, 1925 contract, is a taking of property of the Pratt-Hewit Corporation in vio-

lation of the Texas Bill of Rights in its Constitution, Article 1, Section 19, as well as a violation of the Due Process clause of the Fifth Amendment of the United States Constitution. Furthermore, in result, the decision of the Circuit Court of Appeals has made the Texas Statutory law nugatory as to Usury, Anti-Trust, Monopoly, and Corporate law as to petitioners and the Pratt-Hewit Corporation in this litigation, thus raising a conflict between Circuit Court decision and Texas Statutes.

“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Bill of Rights, Constitution of Texas, Art. 1, Sec. 19.

In the case of *Armstrong v. Traylor, et al*, 30 S. W. 440 the Supreme Court of Texas explained the meaning of the phrase “except by the due course of the law of the land” as used in Art. I Sect. 19 of the Texas Constitution, in the language of Mr. Cooley in his work on Constitutional Limitations, page 432:

“By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.”

From this it clearly appears that, in order that the requirements of “due course of the law of the land” as used in the Texas Bill of Rights, Art. I, Section 19 and the “due process of law” in the Fifth and Fourteenth Amendments of the Constitution of the United States are met, there must be rendered by the

Court a specific judgment or finding on the issue presented to it.

In the case of *State v. Humble Oil & Refining Company*, 263 S. W., p. 319, 323 (Tex. Civ. App. Error Refused), among other contentions of the State of Texas, there was the following—the attorney general of Texas contended that inasmuch as the Standard Oil Company of New Jersey in a previous case in Hunt County, Texas, had been charged with violating the Anti-Trust laws of that state, an agreed judgment had been entered finding it guilty of violation of the Anti-Trust laws of Texas, but a money judgment or fine of \$500,000 and costs was the only punishment assessed by said judgment; that that agreed judgment by virtue of Article 7803 of the Revised Statutes of Texas barred said Standard Oil Company of New Jersey from doing any business in the State of Texas. The Humble Oil and Refining Company is a subsidiary of the Standard Oil Company of New Jersey and therefore the state contended that the former was the alter ego of the New Jersey Standard Oil Company and therefore the disqualification of the latter to do business in Texas by virtue of its plea of guilty and said Article 7803 of the Revised Statutes of Texas was imputed to the Humble Oil and Refining Company.

The Humble Oil & Refining Company's answer in general was that in the agreed judgment there was nothing that would take away from the Standard Oil Company of New Jersey the right to do business in Texas. Therefore, inasmuch as that company is a

Texas corporation, the denial of its right to do business in Texas by virtue of a statutory enactment by its rights as guaranteed to it not only by the Constitution of Texas but by the 14th Amendment of the Constitution of the United States.

The Court said (page 323): "No opportunity of having a trial on the issue enjoining the Standard Oil Company thereafter from doing business in Texas was given or contemplated, since only an agreed judgment was entered. It is therefore clear that, no judgment having been entered upon the direct issue of forfeiture of the right of said foreign corporation to do business in Texas, it follows that the Constitution would not countenance the passage of a statute which would forfeit such right without the opportunity of a hearing and a trial upon such issue directly.

"A similar question to this was passed upon by the Supreme Court in the case of *Steddum v. Kirby Lbr. Co.*, 110 Tex. 525, 221 S. W. 920. The procedure applicable to the case at bar is that a divorce was granted a husband upon the ground that his wife was guilty of adultery. The decree entered granted the divorce upon the specific ground of adultery. Under the statute then in force a wife who was found guilty of adultery forfeited her interest in the community property. The court decreeing the divorce did not declare her rights in the community property forfeited, although it decreed the divorce upon the ground of adultery. The children after the death of the divorced wife instituted suit for the recovery of her interest in the community property; hence the question before the Su-

preme Court, and it disposed of it by the use of the following language:

“Whatever may have been the rule under the laws in force in the Republic at the time of the divorce decree with respect to a wife’s adultery operating as a forfeiture of her interest in the community property, we are unwilling to hold that under the Constitution of the Republic such a forfeiture could have resulted from a mere divorce proceeding, or could have been decreed otherwise than in a direct proceeding for the purpose of declaring the forfeiture, with full opportunity on the part of the wife to be heard. A wife against whom such a forfeiture was sought would have been entitled to a trial upon the direct issue. Such a decree without the opportunity of having such a trial would not have been countenanced by that Constitution.’

“We think this decision conclusive of the question here raised. The Constitution of the Republic of Texas under which the above proceeding was had was practically identical with section 19 of the Bill of Rights of our present Constitution, and practically the same as the “due process of law” provision of the Fourteenth Amendment to the Constitution of the United States.”

The Court in the foregoing case said that a forfeiture of land may not be decreed except “in a *direct* proceeding for the purpose of declaring the forfeiture” and the party against whom the forfeiture is sought “is entitled to a trial upon the *direct* issue.” When the result of a judgment is to effectuate a taking of property from one person and giving it to an-

other, such judgment must be based upon a *direct* issue presented to the Court and the Court must make a *direct* finding upon such issue and what has been decided may not be left to implications, indirection, and speculation before it meets the constitutional requirements of the due process of law.

V. A Discussion of the Second Issue Presented to the Circuit Court of Appeals, as to Which the Court Failed to Make a Finding—Whether the September 28, 1925, Contract was Void and Against Public Policy because Prohibited by the Statutes of Texas.

There was presented to the Circuit Court the issue that the September 28, 1925 contract is void on its face in that it shows that it is prohibited by the statutes of Texas and is therefore also against public policy. This contract is Exhibit 4 and is to be found on pages 876-887 of the Transcript of Record.

“It is well said that a contract which the law denounces as void is necessarily no contract whatever and the acts of parties in an effort to create one in nowise bring about a change in legal status. A void contract is a mere nullity, and is obligatory on neither party to it. ‘It requires no disaffirmance to avoid it and cannot be validated by ratification.’” *Limestone Co. v. Knox et al*, 234 S. W. 131, 134.

The September 28, 1925 contract is void because:

(a) It delegates all managerial powers which the Pratt-Hewitt Oil Corporation directors and officials possessed, by virtue of its charter under the laws of

Texas, to the directors and officials of its competitor, the Houston Oil Company. This question is discussed on pages 25-30 inclusive in the petition for rehearing in the Circuit Court and in the petition for certiorari on pages 42-48 and where Texas and Delaware applicable statutes are quoted.

(b) It violates the Texas Usury Statute. This is a loan contract whereby the Houston Oil Company extended a number of loans to the Pratt-Hewit Corporation, carrying interest at 6% and secured by lien on all of the latter's property, and in addition required the Pratt-Hewit Corporation without any consideration to convey to the Houston Oil Company an undivided $\frac{1}{2}$ interest in all its properties. This is discussed in the Petition for Rehearing on pages 22-25 and in the Petition for Certiorari on pages 48-52 and where Texas Usury Statutes are quoted.

(c) It violates the Texas Anti-Trust and Monopoly Statutes. The contract put all the production and marketing of the oil and gas produced on the Pratt-Hewit properties under the absolute control of the officials of that Corporation's competitor, the Houston Oil Company. This is discussed in the Petition for Rehearing on pages 22-25 and in the Petition for Certiorari on pages 52-56 and where Texas Monopoly and Anti-Trust laws are quoted.

The foregoing issues, standing by themselves, are questions as to local law in Texas and do not pertain to Federal law. Assuming that the Circuit Court of Appeals had stated and made a direct finding on

each question in the negative, no Federal question would then be presented.

However, when the Circuit Court of Appeals failed to make a finding on all or any one or more of these questions and when the result of such silence inescapably takes one-half of all the property owned by the Pratt-Hewitt Corporation, and gives it to the Houston Oil Company, then there has been a taking of one man's property and giving it to another in violation of the due process clause of the Fifth Amendment of the United States Constitution and of Article I, Section 19 of the Texas Constitution.

When it becomes the duty of a court to make a finding on a decisive issue in a case presented to it and the Court fails to make such finding and as a result, one party is deprived of property which is given to another, that failure to act involves the due process clause of the Fifth Amendment of the Constitution of the United States and also Article I, Section 19 of the Texas Constitution and if it occurs in a state court it violates the 14th Amendment. In either case it invokes the jurisdiction of this Court.

VI. The Undecided, Unanswered Issues Presented to the Circuit Court of Appeals Raise Jurisdictional Questions. Making a Finding on these Issues was the Court's Duty.

The two issues presented to the Circuit Court of Appeals which the Court failed to adjudicate, namely, first, that Thomas H. Pratt had disqualified

himself from representing his company by having secret dealings with the Houston Oil Company, and the second, that the September 28, 1925 contract, on its face, showed that it was void and against public policy in that the instrument is contrary to and prohibited by the several statutes, each representing a jurisdictional question, made their adjudication the first duty of the Circuit Court of Appeals.

A void contract "is a mere nullity and is obligatory on neither party to it." *Limestone Co. v. Knox et al, supra*. Therefore, any attempt by courts to predicate judgments on it necessarily are also void and nullities.

The Texas courts have said that a void judgment is "an absolute nullity; and all acts performed under it are nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. It is good nowhere and bad everywhere, neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." (25 Tex. Jur. Sec. 254, p. 693.)

If the September 28, 1925 contract is void on its face, then the judgment of the District Court is void and the affirmance of said void judgment of the District Court is beyond the jurisdiction of the Circuit Court of Appeals.

"A party may always suggest that the court

lacks jurisdiction of the subject matter, or the court may raise that question of its own initiative ('28 U.S.C. Sec. 80 places a duty upon the court to dismiss or remand an action where the court lacks jurisdiction of the subject matter.' Footnote)." Moore's Fed. Prac. Vol. 1, p. 662.

"It is the duty of a federal court to determine a question of its jurisdiction sua sponte, though not raised by either party. U. S. Iowa 1867, Riggs v. Johnson County, 73 U. S. 166, 6 Wall 166, 18 L. Ed. 768 and other cases cited." 20 F. D. p. 725 Sec. 280 (5).

"The want of equity jurisdiction of the district court, if obvious, may and should be objected to by the court of its own motion. Twist v. Prairie Oil Co., 274 U. S. 684, 690." Matthews v. Rodgers, 284 U. S. 521, 524.

The inevitable result arising from the refusal of the Circuit Court is that the Pratt-Hewit Oil Corporation has been deprived of its property which was unlawfully taken possession of by the Houston Oil Company under the pretended September 28, 1925 contract in violation of the Fifth Amendment of the Constitution of the United States and of Article I, Section 19 of the Texas Constitution.

The plain fact of it is, as litigation now stands, the Pratt-Hewit Corporation and its stockholders have been deprived of $\frac{1}{2}$ interest in their 23,000 acres of oil and gas leases now having approximately 70 producing wells (Tr. of R. 709), a $\frac{1}{2}$ interest in the oil and gas taken from said property since September 28, 1925, a $\frac{1}{2}$ interest in all the other personal prop-

erty, together with a deprivation of their right to produce and market their own gas and oil as would seem best in their own judgment, said right to manage their own company's affairs, which have been unlawfully delegated to the officers and directors of the Houston Oil Company, all brought about by the Circuit Court of Appeals in its decision that "there was no fraud" and "the finding of the District Court was free from error," and without making a finding upon the jurisdictional terminative issues as to which the existence or non-existence of fraud is immaterial, which issues were presented to the Circuit Court of Appeals and whose direct finding alone could justify a taking of this property from the Pratt-Hewitt Corporation and its stockholders and giving it to the Houston Oil Company.

As said before, this is not a taking which occurred merely some time in the past but has been going on ever since September 28, 1925, and is going on right now in the face of this litigation pending in this Court. Unless this Court takes jurisdiction, the unanswered two decisive, jurisdictional questions and issues remain undecided and unadjudicated.

Petitioners do not want to be understood as contending that the error complained of is that there has been no adjudication in favor of them on the merits of the issues presented to the Circuit Court of Appeals but that there has been a *denial by the Circuit Court of the right* to a finding on those issues as is guaranteed to them and their corporation and its stockholders, not only by the Fifth Amendment of the

United States Constitution, but equally so by Article 1, Section 19 of the Texas Constitution—a finding that is not merely a speculative inference or innuendo, but, as the Supreme Court of Texas said in *State v. Humble Oil & Refining Company*, supra, a direct finding “upon the direct issue.”

Wherefore, upon the foregoing grounds, it is respectfully urged that the petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

Respectfully submitted,

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Attorneys for Petitioners.

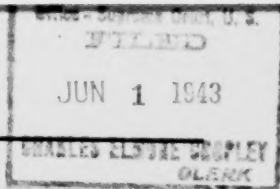
CERTIFICATE OF COUNSEL

I, one of the counsels for the above-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ARTHUR H. BARTELT,
Counsel for Appellants



(29)



IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT
Petitioners

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL
Respondents

SUPPLEMENTAL PETITION FOR REHEARING

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*To the Honorable Chief Justice of the United States
and the Associated Justices of the Supreme
Court of the United States:*

The Judgment Dismissing with Prejudice in the Case of Hewit et al v. the Pratt-Hewit Corporation et al in the District Court of Refugio County on January 26, 1927, During Vacation Time, is Void as it Appears on the Record of the Judgment Pleaded by the Houston Oil Company in its Motion to Dismiss Plaintiff's Second Amended Complaint (Tr. R. 223-228), in that F. F. Dollert and the Pratt-Hewit Corporation, Being Parties in the Case, Did Not Give Their Consent to Taking up the Case During Vacation Time as Required by Article 1915 of the Vernon Anno. Civ. Statutes of Texas.

The District Court, in its conclusions of law No. 3, found that intervenor F. F. Dollert was bound by the "judgment of dismissal with prejudice entered in that case in 1937 and cannot recover here, and the defendants' plea of *res adjudicata* heretofore filed will at this time be sustained." (Tr. R. 518) The Circuit Court of Appeals says "The findings and conclusions of the District Court are free from error."

"Section 80. Powers in Vacation—The general rule is that all judicial business must be transacted by a court in term time and that only such business can be disposed of in vacation as is expressly authorized by the Constitution and statutes under which the court exists, and that a judge after adjournment may not, without *express* authority, take any action or render any order whatever. In an early case, *Hunter v. Nichols*, 55 Tex. 217, 224, it was said by the Supreme Court:

'It is with us inherent in the very conception of a court that its session shall be publicly held; that what it does shall *not be done in a corner*; and hence it is that *time*, and place, and terms, are prescribed for its sessions by law.

And a court cannot lawfully hold its sitting at any other *time* or place. Judgments or decrees out of term time are simply void—they are *utter nullities*. *Hodges v. Ward & Ingram*, 1 Tex. 244; *Crosby v. Houston*, 1 Tex. 203; *Womack v. Womack*, 17 Tex. 2; *Freeman on Judgments* 121.'

"The statute, however, provides that: 'Art. 1915. (1714) Powers in vacation.

Judges of the district courts may in vacation, by consent of the parties, exercise all powers, make all orders, and perform all acts, as fully as in term time, and may, by consent of the parties, try any civil case, except divorce cases, without a jury and enter final judgment, etc." 11 Tex. Jur. p. 816.

The court terms of the district court of Refugio County, Texas, are as follows: "On the sixth Monday, after the second Monday in February and the sixth Monday after the first Monday in September and may continue *three weeks*." Art. 199 of the Vernon Civ. Statutes of Texas.

"The case not having been tried by consent of the parties in vacation, under the terms of Article 1714, the action of the court in dismissing the petition was likewise erroneous. It is well settled in this state, as well as in other jurisdictions, that a judge during vacation cannot dismiss a bill in equity. Price v. Bland, 44 Tex. 145; Aiken v. Carroll, 37 Tex. 73; Coleman v. Goynes, 37 Tex. 552; Grant v. Chambers, 34 Tex. 574-588; Ann. Cas. 1916A. 1230, notes." Walker et al v. Meyers et al., 266 S. W. 499. (Sup. Ct. of Texas).

"All judicial business must be transacted by a court in *term time*, except such as may be specially authorized by constitutional or valid statutory provisions. Texas Electric & Ice Co. v. City of Vernon, Tex. Civ. App. 254 S. W. 503" Citizens State Bank etc. v. Miller County Judge, 115 S. W. 2d 1183 (Civ. App.)

Thus the Circuit Court of Appeals has decided an important question of local law in a way that is in direct conflict with the statutes and Constitution of Texas and the applicable local decisions of the courts of that state.

Inasmuch as the record of the judgment on its face, as pleaded by the Houston Oil Company in its motion to dismiss plaintiff's second amended complaint, shows that neither Dollert nor the Pratt-Hewit Corporation consented to take up this case during vacation time, the judgment in the State Court is void and a nullity on its face. It does not constitute an adjudication of question of whether the September 28, 1925 contract is or is not illegal and void. Nevertheless, in its results, following from the Circuit Court affirming the decision of the district court, it is permitting the Houston Oil Company to take possession of and keep the property of the Pratt-Hewit Corporation without there ever having been an adjudication as to whether the property rightfully belonged to the Houston Oil Company. Thus the decision of the Circuit Court presents an unlawful taking of the property of the Pratt-Hewit Corporation in violation of the 5th Amendment of the Constitution of the United States, a Federal question decided in a way probably not in accord with the applicable decisions of this Court and also presents an unlawful taking of property in violation of Article I section 19 of the Constitution of Texas.

The facts pertaining to this jurisdictional question are set out in more detail in petitioners' reply

brief to the brief of the respondents, Houston Oil Company et al on pages 2-13, where petitioners contended that the failure of the Court or of the defendants to give notice to Dollert and to the Pratt-Hewit Corporation that the case would be taken up in vacation time and dismissed, constituted a violation of the Fifth and Fourteenth Amendments of the United States Constitution. F. F. Dollert had appeared by his attorney, Mr. Booth of San Antonio, and intervened as a plaintiff, adopting the petition of plaintiff, Hewit. The Pratt-Hewit Corporation, although the real plaintiff, was nominally a defendant. Pratt and the other directors and officials of the Pratt-Hewit Corporation were all made defendants. Attorneys Crain & Vandenberg, the personal attorneys of Pratt in the case, attempted to represent the Pratt-Hewit Corporation in giving consent to taking up this case during vacation time, which they were disqualified from doing because they could not appear for both plaintiff and defendant. (Tr. 223-228)

Petitioners do not want to be understood to be admitting that the issues in the case in the state court were the same as the issues in the instant case. That is impossible because the evidence of the 18 overt acts of Pratt with the Houston Oil Company which shows a conflict between Pratt's private interests and the duty he owed to his corporation, was not discovered until two years after the judgment in the State Court was entered.

Wherefore, upon the foregoing grounds and those offered in the original petition for rehearing, it is respectfully urged that the petition for rehearing be

granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

Respectfully submitted,

ARTHUR H. BARTELT,
Austin, Texas
W. B. RUBIN,
Milwaukee, Wisconsin
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I, one of the counsels for the above-named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Arthur H Bartelt

ARTHUR H. BARTELT
Counsel for Appellants.

